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CHASING JUSTICE, CHALLENGING POWER:
LEGAL CONSCIOUSNESS AND THE MOBILIZATION OF
SEXUAL HARASSMENT LAW

by

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ABSTRACT OF THE DISSERTATION

Chasing Justice, Challenging Power:

Legal Consciousness and the Mobilization of Sexual Harassment Law

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This project examines the legal consciousness of women who have filed sexual harassment complaints against their employers. I chose to focus on sexual harassment because I am particularly interested in the intersection of law and social attitudes about gender and sexuality. Examining the experiences of women who turn to the law in response to sexual harassment helps uncover the ways in which power in American law and social structures is suffused with understandings of gender and sexuality. My project attempts to understand the viewpoint of those who would challenge the existing power dynamic, and explore how the social structures of gender, sexuality and patriarchy are implicated in women's conceptions of legality.

The analysis is based on interviews with a dozen women who experienced sexual harassment in the workplace. These women have distinguished themselves from their peers by filing a formal complaint, lawsuit or grievance. The interview subjects, unlike the majority of women who are sexually harassed, have decided to invoke the law on

their behalf.

In order to understand how legal consciousness informs the understanding, expectations and experiences of my respondents, I develop a theoretical framework based on legal consciousness literature and feminist analysis of sexual harassment law. I explore the questions of how my respondents view the law, the expectations they have of law and how their interaction with the legal system influences their legal consciousness.

The interviews paint a vivid picture of the experience of harassment and the implications of trying to use the law as a means of empowerment. The stories of these individual women illustrate the power of law to constrain individual action, and emphasize how patriarchy establishes and maintains gender inequality in the social and economic structures of the workplace and the legal system. However, they also show how individuals will resist the hegemonic power of the law and seek to use the law to empower themselves, despite an awareness of the challenges and limitations of law.

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INTRODUCTION

In the fall of 1991 the American public was mesmerized by the spectacle of a nominee to the Supreme Court being publicly accused of sexual harassment. Although Catharine MacKinnon (1979) had identified sexual harassment as a legal wrong over a decade earlier, it was the Clarence Thomas nomination hearings that brought national attention to the problem of sexual harassment. The allegations by Professor Anita Hill, that Clarence Thomas had harassed her while he served as chairman of the EEOC, generated front page news and brought the issue of sexual harassment to the attention of the mainstream media. In the aftermath of the hearings, news stories about sexual harassment emphasized the prevalence of the problem and kept the issue in the public eye. Public opinion polls taken during the hearings indicated that a significant majority of the public believed sexual harassment to be a serious problem, compared only 20% who said sexual harassment was a problem a decade before (see Patterson, 1994).

The U.S. Supreme Court ruled in 1986 that sexual harassment which creates a hostile work environment is employment discrimination actionable under Title VII of the Civil Rights Act. (*Meritor Savings Bank v Vinson*) Nevertheless, Anita Hill, along with many other women, did not realize that the abusive and demeaning treatment they were exposed to, sometimes daily, was against the law. Although studies continue to show that the majority of women who experience sexual harassment in the workplace never file a formal complaint, the number of women turning to the law to address this problem increased dramatically after Anita Hill came forward with her accusations. In the wake of the Thomas hearings, federal and state agencies reported a dramatic increase in sexual

harassment case filings.¹

My research project examines the legal consciousness of women who have filed sexual harassment complaints against their employers. I seek to understand how these women think about and apply legal language, concepts and authority to their own experience of sexual harassment. The analysis is based on interviews with women who have experienced sexual harassment in the workplace and who have distinguished themselves from their peers by filing a formal complaint, lawsuit or grievance. They are women who, unlike the majority of women who are sexually harassed, have decided to invoke the law on their behalf. These interviews paint a vivid picture of the experience of harassment and the implications of trying to use the law as a means of empowerment.

With this research I attempt to create a framework for understanding how these women perceive the law and how the law gives meaning to their actions and their experiences. This is not simply a question of why they turn to the law to resolve their problems, but rather, how they view the law. What expectations do they have of law, and how does their interaction and experience with the legal system influence their legal consciousness? In order to understand how legal consciousness informs the understandings, expectations and experiences of my respondents, I develop a theoretical framework based on legal consciousness literature and a feminist analysis of sexual harassment law.

Law and courts are such an integral part of our political system that legal ideals and concepts often come to shape the political landscape. Tocqueville suggested that

¹The New Jersey Division of Civil Rights reports a 208% increase in sexual harassment filings from 1990 to 1994. The number of sexual harassment claims filed with the EEOC increased from 6883 in 1991 to 14,420 in 1994, and has remained steadily around 15,500 through 2001.

every political question in the US eventually becomes a legal question. Not only does every political question eventually become a legal one, but many legal questions have significant political impact. Traditional studies of law and social change have focused on how law, defined as legal actors and institutions, impact social attitudes and creates social change. This form of scholarship generally focuses on legal norms, legal rules, and legal actors in an attempt to discern the effectiveness of law, with an assumption that legislation or judicial decisions will (or should) have a direct impact on behavior. In *The Politics of Rights*, Scheingold (1974) articulates the limitations of this approach in his discussion of the myth of rights: “Legal frames of reference tunnel the vision of both activists and analysts leading to an oversimplified approach to a complex social process... the myth of rights...is premised on a direct linking of litigation, rights, and remedies with social change” (p. 5). As Scheingold asserts, focusing primarily on the institutions and practice of law provides a limited view of the relationship between law and social change, and does not take into account the dynamic relationship between law, attitudes, social context and behavior.

An alternate approach is endorsed by McCann in *Rights at Work*, McCann (1994) proposes an interactive and dynamic understanding of law. Legal knowledge, he argues, informs social activity, and legal concepts shape the way citizens understand and interpret conflicts. In addition, legal symbols and legal discourse are informed by individual understanding, attitudes and experiences. This approach to law recognizes the importance of examining the ways that law emerges out of and is constituted by specific historical, cultural, social situations and attitudes. Once law is understood to be an integral feature of social relations, rather than an external autonomous force, then

research must strive to understand how law operates through social life as people consciously or unconsciously invoke legal language, authority and procedures.

In their study of legal consciousness in the context of everyday life, *The Common Place of Law*, Ewick and Silbey (1998) assert that legal consciousness is more than simply a set of attitudes, it is an ideology which is expansive, contradictory and fluid. Ewick and Silbey posit a reciprocal and constantly shifting relationship between legal norms and concepts, and attitudes about law and legality. “In this theoretical framing of legal consciousness as participation in the construction of legality...We understand consciousness to be formed within and changed by social action” (p. 46). Legal consciousness develops and evolves through individual experiences and changes as a result of those experiences. The act of filing a complaint against an employer is informed by one’s understanding of law and also informs one’s legal consciousness.

I chose to focus on sexual harassment in my study of legal consciousness because I am particularly interested in the intersection of law and social attitudes about gender and sexuality. Sexual harassment exemplifies the power relationships which derive from the social construction of gender and sex. Sexual harassment exists on a continuum of sexual violence and abuse that pervades many of the world’s cultures. Advocates against sexual violence often argue that rape, and with it sexual harassment, is an issue of power, not sex. However, feminist scholarship asserts that power, sex and gender are inextricably entwined in American law and society.

Examining the experiences of women who turn to the law in response to sexual harassment helps to uncover the ways in which power in American law and social and structures is suffused with understandings of gender and sexuality. The legal system

serves the contradictory and paradoxical roles of reinforcing traditional attitudes about gender and power while also creating an opportunity to challenge existing power relations. My project attempts to understand the viewpoint of those who would challenge the existing power dynamic to examine how their experience with the legal system informs their legal consciousness, and to explore how the social structures of gender, sexuality and patriarchy are implicated in their conceptions of legality.

Understanding Sexual Harassment

Sexual harassment is neither a recent nor a rare phenomenon. Long before it hit the front pages and the nightly news with Anita Hill, women have endured sexual harassment. The problem of sexual harassment in the workplace has been around as long as women have taken jobs outside of the home. In primarily female occupations, women are often assumed to be subservient sexually as well as professionally. In male dominated professions the presence of women is perceived by some as threatening, and harassment may be an attempt to put women in their place.

The continuing problem of sexual harassment reflects the propensity in our society to view women primarily as sexual objects. Just as racial segregation reflected a fundamental belief in the inferiority of the black race, sexual harassment is indicative of the extent to which women are regarded as potential sexual conquests. In colonial America most African American women were considered property and were sexually abused and exploited as reproductive servants by their white masters. In the nineteenth century women working outside of the home were often sexually exploited by their employers:

The practice of sexual harassment is centuries old...sexual coercion was an entrenched feature of chattel slavery endured by African-American women without the protection of law. While there were crucial differences in the situation of free women employed in domestic service, they too, commonly faced sexual advances by men in the households in which they worked...women employed in manufacturing and clerical positions the late nineteenth and early twentieth centuries [were subject to] imposed sexual relations - ranging from assault to all manner of unwanted physical or verbal advances (Siegel, 2004 p 3).

Sexual harassment must be understood within the context of sexual violence against women. Harassment can occur along a continuum from gender harassment to seductive behavior, sexual bribery, sexual coercion and sexual assault. Gender harassment consists of general sexist, degrading comments and behavior which conveys sexist attitudes. Offensive, insulting behavior toward gays and lesbians, which is not intended to elicit a sexual response would fall into this category. Seductive behavior is unwanted and offensive sexual suggestions and propositions. Sexual bribery and sexual coercion constitute what is known in law as “quid pro quo” harassment, in which professional advancement is linked to sexual favors, or conversely the failure to perform sexually is punished by demotion, negative performance reviews or other abusive treatment. Sexual assault includes unwanted touching and groping as well as attempted and actual rape. Louise Fitzgerald (1990), a leading social psychologist who studies sexual harassment, offers this definition of harassment:

Sexual harassment consists of the sexualization of an instrumental relationship through the introduction or imposition of sexist or sexual remarks, requests, or requirements, in the context of a formal power differential. Harassment can also occur where no such formal power differential exists, if the behavior is unwanted by, or offensive to, the woman...When a formal power differential exists, all sexist or sexual behavior is seen as harassment, since the woman is not considered to be in a position to object, resist, or give fully free consent (p. 24).

Historically, women have been economically dependent on men and beholden to men for sexual services. Whether in the context of marriage, slavery, prostitution, or as employees, male expectations of female sexual subservience and availability have been a constant feature of American culture. "Two forces of American society converge: men's control over women's sexuality and capital's control over employees work lives. Women historically have been required to exchange sexual services for material survival, in one form or another. Prostitution and marriage as well as sexual harassment in different ways institutionalize this arrangement" (MacKinnon, 1979 pp. 174-175).

Sexual harassment in the workplace is an aspect of male dominance and control over women's sexuality which implicates race and class as well as gender. Jill Laurie Goodman (1981) offers this account of the implications of class for sexual harassment:

Before the late nineteenth century, the only substantial classes of women working outside the homes and farms of their families was servants....By the end of the nineteenth and beginning of the twentieth century...women working outside their homes were still exceptional...Taking a job was considered neither respectable nor something that an honest woman would do, and women who did so were considered to have given up their claim to gentle treatment. The distinction between women who sold their labor and women who sold their bodies was not often made (p. 448-449).

This description does not take into account the historical experiences of Black women in America. "Black women in America have always been workers - as slaves, farmers, domestics, skilled and unskilled laborers..."(Scarborough, 1989 p. 1457). Before emancipation most Black women in America were considered property and were sexually abused and exploited as reproductive vessels by their white masters. Black women's experience of sexual harassment often has significant racist overtones. Crenshaw (1992) notes, "Pervasive stereotypes about Black women not only shape the kind of harassment that Black women experience but also influence whether Black women's stories are likely

to be believed" (p. 1470). Two pervasive racial stereotypes are particularly relevant to the sexual harassment experiences of black women:

The Mammy stereotype was that of an overweight, matronly, do-gooder who was asexual. The Jezebel was the promiscuous female with an insatiable sexual appetite...While the Jezebel stereotype most obviously supported the sexual exploitation of Black women...the harassment claims of a "Mammy" would fall on deaf ears because no one believed that a man would lust after an asexual woman...These stereotypes, which were borne in the slavery experience of Black women, continued to exist after slavery ended and still contribute to the unique harassment experience of Black women today (Dennis, 1996, p. 561-562).

The power differential which contributes to harassment is often more severe for women of color and immigrant women. In addition to the economic and educational disparities which confront women of color, racial stereotypes infuse the dynamic between sex and power and their experience of harassment:

Hispanic women have been described as hot-blooded, ill tempered, religious, overweight, lazy, always pregnant, loud mouthed, and deferent to men. Native American women are perceived as poor, sad, uneducated, isolated, and devoted to male elders, Asian women have been described as small, docile and submissive. However, they are also viewed by some as the exotic sexpot who will cater to the whims of any man (Defour, 1990 p. 48-49).

Barbara Gutek (1985), one of the first scholars to develop a large scale survey to study sexual harassment in the workplace, identifies what she terms the sex role spillover model; "Sex role spillover [denotes] the carryover into the workplace of gender based roles that are usually irrelevant or inappropriate to work" (p. 15-16). The imposition of traditional gender based sex roles in the workplace creates an environment where women are expected to be submissive, both professionally and sexually. Women are encouraged to conform to traditional nurturing roles and to be content serving as helpers and assistants without the ambition to advance into managerial or leadership positions. In addition, men are expected to be dominant in the workplace and to be sexual aggressors.

In this framework, women are often viewed primarily as potential sexual conquests rather than workers. Gutek points out that, “although many aspects of gender roles can carry over to work, the sex object aspect is the most relevant to the topic of [sexual harassment]. Being a sex object is one aspect of the female sex role, perhaps a fairly central aspect” (p. 36).

Many studies have shown that harassment is more common in predominantly single sex workplaces. Sexual harassment appears to be less frequent in gender balanced workplaces. As an exhibition of power and male dominance, sexual harassment has been found to be more prevalent in workplaces where negative stereotypes and prejudices prevail, where women are viewed as sex objects and inferior to men (see Stockdale 1996 & Paludi 2003). In primarily male workplaces women are seen as a threat and are often harassed for failing to conform to traditional roles. In traditional female jobs women are assumed to conform to traditional female gender roles, including submissiveness and sexual availability.

Although no profile has been established of a man most likely to harass women, there is evidence that men who hold traditional attitudes about women, who emphasize male dominance and sexual aggression are more likely to engage in sexual harassment.

Research on sexual violence has demonstrated...that rape offenders are often normal individuals who, instead of holding deviant personality characteristics, have traditional, patriarchal sex role attitudes characterized by acceptance of rape myths and negative attitudes toward women...A similar portrait of perpetrators of sexual harassment emerges (Stockdale, 1993 p. 8-9).

Some feminists argue that harassment, which is an aspect of sexual violence, should be understood as an issue of power rather than sex. Catharine MacKinnon (1987) asserts that the primary dynamic by which men continue to dominate women is sex;

“Since 1970, feminists have uncovered a vast amount of sexual abuse of women by men. Rape, battery, sexual harassment, sexual abuse of children, prostitution and pornography, seen for the first time in their true scope and interconnectedness, form a distinctive pattern: the power of men over women in society” (p. 5). Sexual harassment in the workplace continues to be a widespread problem. The power differential that exists in the workplace generally puts women at a disadvantage with respect to male supervisors and co-workers. The sexualization of power is so ingrained in American society that any discussion of sexual harassment must acknowledge the relationship between sex, gender and power.

Assessing Sexual Harassment

A significant body of research has confirmed the prevalence of sexual harassment in the workplace. Large scale surveys conducted in the 1980's and 1990's indicate that almost half of working women will be harassed at some point. Barbara Gutek (1985) reports "Between one quarter and one half of all women have been sexually harassed sometime during their working lives...Over 20 percent of women have quit a job, been transferred, been fired, or quit applying for a job because of sexual harassment" (p. 58).

The U.S. Merit System Protection Board initiated a study of sexual harassment of federal employees in 1980 and conducted follow up surveys in 1987 and 1994. The overall incidence of harassment remained fairly consistent over the period of the studies; approximately 40% of female federal employees and 12% of male employees reported having experienced some form of sexual harassment in the two year period of the study (USMSPB 1995). Reports of sexual harassment in the military are somewhat higher,

which is not surprising, given that the military continues to be a male dominated environment and a profession which has traditionally been hostile to including women. A 1991 study of sexual harassment in the Navy found that more than 40% of enlisted women and one third of female officers reported that they had been sexually harassed in the previous year (Culbertson and Rosenfeld, 1991). A study conducted in 1995 by the Department of Defense to assess harassment among all branches of the military reported that 55% of women and 14% of men had experienced sexual harassment in the previous year (Gruber 2003).

By far, the most common form of harassment is men harassing women. Women are much more likely to be sexually harassed than men, and are most often harassed by supervisors or employers, although co-worker harassment is not uncommon. Men comprise the majority of perpetrators of harassment against both men and women. Research on sexual harassment against men has found that men are more likely to be harassed by other men, and are very rarely harassed by either women coworkers or supervisors. Same sex harassment of men by men often takes the form of behavior that enforces traditional male gender roles against someone who is perceived as not masculine enough. Men may be targeted for harassment if they don't conform to the harasser's stereotype of heterosexual masculinity (Paludi 2003). Sexual harassment of lesbians by men reflects similar biases, and is often an expression hostility against women who evince "atypical" gender role behavior.²

Existing research on sexual harassment indicates that, in general, men and women have very different perceptions of what constitutes harassment. Gutek reports that men

² In all my research, I have found no reports of incidents involving same sex harassment of women by women.

are more likely to describe any given behavior as sexual, but are less likely than women to label sexual behavior as harassment (p. 92-93). A 1988 survey about sexual harassment in the university setting, reported that although a significant minority (26.4%) of male professors admitted having a sexual encounter with a student and another 11% reported having attempted physical contact with a student, only one respondent stated that he had ever done anything which could be considered harassment (Fitzgerald et al 1988, p. 332-335).

Gendered attitudes about sexuality and a gender based power differential in society and the workplace are at the crux of the continuing problem of harassment. Sexual harassment is one example of how the relationship between sex and power is played out in American law and society. Women's sexuality is defined and circumscribed by strong social attitudes and conventions which irrevocably influence our institutions; our workplaces, schools, courts and government agencies. Sexual harassment is condoned by a culture that has historically excluded women from positions of power and authority:

The prevalence and acceptance of sexual harassment have its origins in a history that has, for the most part and until recently, left men and not women in positions of power, where they make decisions: as employers determining how to respond to sexual harassment charges, as judges hearing sex discrimination cases...As decision makers, such men determine and enforce cultural norms. To the extent their insights and experiences are different from those of women, women's perceptions are excluded and minimized...Male perceptions of sexual harassment have triumphed precisely because of the ability of men to label women as outsiders and then determine cultural norms without reference to female perceptions (Goodman 1981 p. 466-468).

Research in the military, where power differences are clearly delineated, confirms that harassment is most often found where there is a significant power differential. The Navy found that enlisted women were more likely to be targets of sexual

harassment than female officers (44% compared to 33%). “Victims of sexual harassment tended to be over-represented among the junior women as compared to their mid career or senior counterparts. [This supports] the model that contends that harassment is a result of the exertion of power or authority by someone higher in the organizational structure” (Culbertson and Rosenfeld p. 84). General Claudia Kennedy, the highest ranking woman in the U.S. Military, reports that enlisted women are the most frequent targets of harassment, and that particularly egregious abuses of power occur in the case of young enlisted women trainees who are sexually abused by their drill instructors (Kennedy 2001).

The prevalence of traditional sex roles and the existing gender distributions of power contribute to the low incidents of reporting sexual harassment. Most major studies indicate that fewer than one-fifth of the victims of sexual harassment filed any type of formal complaint. The survey of federal workers indicates that although 74% of the victims of harassment knew about formal complaint channels, only 6% reported taking formal action (USMPB 1994). Polls taken during the Thomas/Hill hearings indicated that approximately 80% of women who said they had been sexually harassed did not report it at the time (see Patterson 1994). The data clearly indicates that the majority of women do not file complaints against their harassers because they recognize that the power dynamic in the workplace is likely to be a disadvantage in their situation. “In the 1988 *Working Woman* survey, fear of retaliation was cited as the chief reason for not reporting incidents of harassment. Employees also described a lack of confidence in the complaint structure...Many women found it easier to quit than complain” (Siegel, 1995 p. 34).

Like victims of other forms of sexual abuse, victims of sexual harassment often feel guilty and responsible for the harassment. Many said they did not report the harassment because they feared reprisal, that they would be blamed for the harassment, and that nothing would be done even if they did report it (Gutek pp. 70-72). The survey of federal workers shows that, by far the most common responses of women to sexual harassment were ignoring the behavior (45%), asking or telling the person to stop (41%), and avoiding the person (33%). Only 13% reported the behavior to a supervisor (USMPB, 1994). The Navy study reported that, as is the case with civilian women, the most common responses to harassment were avoiding the perpetrator and telling the person to stop. Only 24% of enlisted women and 19% of female officers reported the harassment to a supervisor (Culbertson and Rosenfeld 1991).

The impact of sexual harassment on the victims is severe, emotionally, psychologically and physically. Victims of harassment often experience significant emotional trauma including decreased self esteem, depression, fear and anxiety. Women who have been sexually harassed report many of the difficulties and illnesses associated with other forms of sexual abuse, including guilt, shame, feelings of betrayal and decreased libido. Research has also found significant physical consequences as a result of harassment, such as gastrointestinal problems, ulcers, loss of appetite, weight loss, headaches, and insomnia (see Paludi and Brickman, 1991, also Paludi 2003).

Public awareness of the problem of harassment has grown since the early 1990's as a result of the dramatic increase in media coverage of the issue starting with the Thomas confirmation hearings (see Patterson, 1994). Along with increased attention to the issue has come a dramatic increase in the number of sexual harassment complaints

filed. In the early 1990's, agencies that handle sexual harassment complaints reported a significant increase in the number of sexual harassment cases filed. The combined total of sexual harassment complaints received by the EEOC & FEPA (Fair Employment Practice Agency) more than doubled from 6,883 in FY 1991 to 14,420 in FY 1994. The number of sexual harassment claims filed between 1996 and 2005 remained steadily between 15,000-16,000 (www.eeoc.gov/stats/harass.html).³

Regional EEOC offices report a much larger proportion of their total discrimination cases filed as sexual harassment discrimination (sex discrimination being the second most common type of employment discrimination complaint, after race). In 1991 sexual harassment complaints in the Philadelphia district office of the EEOC were 5% of the total discrimination suits filed, by 1996 they had reached 13% (Data provided by Philadelphia District office of the EEOC). The New Jersey Division of Civil Rights reports a 208% increase in sexual harassment filings from 1990 to 1994. In New Jersey sexual harassment filings rose from 3% of all discrimination suits filed to 8% by 1994 (Data provided by NJ Division of Civil Rights).

Ellen Bravo, co-director of 9 to 5 National Association of Working Women, reports that many more women are aware that sexual harassment is against the law and that they have the right to file a complaint, and a growing number of employers are instituting anti-harassment policies. Nevertheless, the problem remains pervasive and a legal solution remains out of reach for most women:

...no industry is free of harassment...While the majority of fortune 500 companies

³A decline in sexual harassment cases is reported by the EEOC from 15,475 in 2001 to 12,025 in 2006. No systematic research has been done to explain this decline, but some research suggest that businesses are becoming more savvy by instituting anti-harassment policies which serve to discourage complaints and may also help to avoid liability in the event of a lawsuit (see chapter 4).

provide some training, most workers across the country don't receive any. Some cases have resulted in large settlements, but most people who experience harassment never report it. Of the minority who do, most complainants never receive a cent (9 to5 press release, October 2001).

Sexual Harassment and the Law

The term sexual harassment did not come into popular use until the publication of *Sexual Harassment of Working Women*, the first major work on sexual harassment in the workplace. MacKinnon (1979) notes:

It is not surprising either that women would not complain of an experience for which there has been no name. Until 1976, lacking a term to express it, sexual harassment was literally unspeakable, which made a generalized, shared, and social definition of it inaccessible. The unnamed should not be mistaken for the nonexistent (p. 27-28).

MacKinnon argued that sexual harassment was sex-based employment discrimination and should be illegal under Title VII of the 1964 Civil Rights Act which states that it shall be unlawful for an employer to "...discriminate against any individual with respect to...compensation, terms and conditions, or privileges of employment, because of such individuals race, color, religion, sex or national origin" (42 USCA Sec. 2000e-2a).

Under the American legal system women's sexuality has historically been regulated and controlled by men. On the one hand, the law has historically perpetuated a public/private dichotomy which relegated women into the private sphere as legal nonentities. Sexual relations between men and women were presumed to fall within the "private" realm, and therefore not within the domain of law. On the other hand, women's sexual availability and submission to men was generally accepted and consent was presumed. American courts in the 19th century required a showing of "utmost resistance" to indicate that a sexual act was non-consensual. An 1874 decision of New York's high

court asserted, “If a woman...does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant?” (Siegel, 2004 p. 4) The courts did not regard economic coercion to be relevant, and even physical resistance was overlooked if it did not appear to reach the high standards of the day:

Unless women could show that they had preformed an elaborate ritual of resistance...which was necessary to overcome the overwhelming presumption that women latently desired whatever was done to them, they could expect little recourse from the criminal law. Rape law’s protection was further vitiated by the fact that prosecutors and judges relied on all kinds of race and class-based assumptions about the ‘promiscuous’ nature of the women in domestic service and other forms of market labor as they reason about utmost resistance (Id).

These attitudes, of course, continued well into 20th century law. Especially in the case of rape, where questions of the victim’s attire, behavior, willingness and reason for being in a particular place at a particular time are often put forward as a rationale that she was somehow “asking for it.” The central focus of the law in cases of sexual abuse and harassment is often on the victim rather than the perpetrator. The EEOC defines harassment as “unwelcome” sexual behavior in the workplace, and courts have, for the most part, put the burden on the victim to show the behavior was unwelcome. As Fitzgerald (2004) points out, “...rather than requiring a women to demonstrate that the man’s behavior was offensive, such inquiries should focus on what he did to ascertain that he was welcome. This struggle over who gets to say what is unwelcome reflects the tenacity of the cultural insistence that sexual advances by any man to any women are by definition welcome until she proves otherwise” (p 95). With regard to sexual harassment law, Estrich notes, “The rules and prejudices have been borrowed almost wholesale from traditional rape law. The focus on the conduct of the woman - her reactions or lack of them, her resistance or lack of it - reappears with only the most minor changes” (Estrich,

1991 p. 815).

It was not until the late 1970's that sexual harassment began to be acknowledged by the courts as a form of employment discrimination. This recognition came in the wake of the "second wave" feminist movement, with a growing number of women entering the workforce and demanding greater equity in the workplace. Chamallas (1993) notes, "The legal claim for sexual harassment is notable for its distinctively feminist origins. Born in the mid-1970's, the term was invented by feminist activists, given legal content by feminist litigators and scholars, and sustained by a wide-ranging body of scholarship generated largely by feminist academics" (p. 37).

Both the structure and logic of the law serve to exclude women's perspectives. Legal language and doctrine emphasize the ideals of objectivity, neutrality and individual rights and reinforce the status quo of male domination by making men the norm. "Proceeding by analogy, as law does, means that new crimes and injuries must be like old ones (read men's) before they can be recognized as crimes and injuries at all" (MacKinnon, 1993 p. 111). In the case of sexual harassment, women's experience was generally disregarded in favor of a "neutral" perspective, which relied on the privileged white male as the norm. Since it is most often men who decide what constitutes harassment, traditional gender roles were generally upheld and women's claims were ignored.

The American legal system is based on social norms and legal language developed by privileged white men. Accordingly, the law often fails to address the needs and experiences of women, minorities, and the underclass:

Throughout the history of Anglo-American jurisprudence, the primary linguists of

law have almost exclusively been men - white, educated, economically privileged men....As the men of law have defined law in their own image, law has excluded or marginalized the voices and meanings of those "others" ...Because the men of law have had the societal power not to have to worry too much about the competing terms and understandings of "others," they have been insulated from challenges to their language and have thus come to see it as natural, inevitable, complete, objective, and neutral (Finley, 1993, p. 571).

In the earliest sexual harassment cases, courts recognized "quid-pro-quo" sexual harassment as a form of employment discrimination. In these cases employment is made contingent on sexual favors or an employee is penalized for failing to submit to the sexual advances of a supervisor. In *Barnes v. Costle* (1977) the circuit court acknowledged that the sexual advances Barnes complained of were a condition to which male employees were not exposed, and therefore constituted discrimination based on sex:

It is much too late in the day to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men...To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman...no male employee was susceptible to such an approach (p. 989-990).

These early cases did not challenge the fundamental logic of the law that relies on a male norm. In *Barnes*, the court articulated what has come to be known as the "but for" approach. Discrimination is found to exist upon "the exaction of a condition which, *but for his or her sex*, the employee would not have faced" (p. 987, emphasis added). In other words, to be treated equally is to be treated the same as men. In this framework the particular harms done to women by sexual harassment are not acknowledged or incorporated into the legal definition of discrimination.

Although MacKinnon (1981) described sexual harassment as "the first legal wrong to be defined by women"(p. i), it is still generally men who decide what constitutes harassment, and the ostensibly neutral, objective approach to law

systematically excludes the perspectives of those most likely to be victims of harassment. The most prevalent form of sexual harassment, that which creates a hostile working environment but does not necessarily include sexual coercion and overt threats of job loss, would not be recognized by the courts for almost a decade after the *Barnes* decision.

Hostile environment sexual harassment, which is far more prevalent and insidious, is much more difficult to define and prove since it does not depend on threats of job loss or penalties of employment. What constitutes a hostile environment is a subjective determination. In 1980 the EEOC issued extensive regulations regarding sexual harassment, and specified hostile harassment as a form of discrimination:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when...such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment (29 CFR 1604.11).

Nevertheless, judges continued to rely on gender-based sex roles when deciding hostile environment harassment cases. Actions that women claimed created a hostile environment were understood as normal, and amorous behavior of men toward women was deemed a matter of personal relationships rather than a legal issue.

The district court decision in *Rabidue v Oseloa Refining Co.* (1984) exemplifies what I like to call the boys will be boys defense:

Indeed, it cannot be seriously disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not...designed to bring about a magical transformation in the social mores of American workers (p. 430).

In fact, the circuit court upheld the *Rabidue* ruling, asserting that vulgar language and

sexually explicit posters in the workplace did not constitute a hostile working environment under Title VII, “when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime time television, at the cinema, and in other public places” (*Rabidue v. Osceola Refining Co.* 1986 p. 622).

The majority contention in *Rabidue*, that institutionalized sexism in society makes it acceptable in the workplace, points out how differences in perspective and life experience between men and women inform legal decisions. For women, sex and gender are associated with limited power in all aspects of society; personally, financially, politically. In sexual harassment law, the dynamic between gender and power often continue to work to women’s disadvantage:

One principal reason for the pervasiveness of sexual harassment in the workplace is that men regard conduct, ranging from sexual demands to sexual innuendo, differently than women do...Because men are most often the perpetrators of such conduct, they have not been compelled to consider how it feels to be a recipient. Moreover, because men still exercise control over most work places, their views of sexual behavior in the workplace remain the norm...Because most judges are men, who have experienced the traditional forms of male socialization, their instinctive reaction is to accept the perspective of the employer (Abrams, 1989 p. 1202-1203).

In 1986 the U.S. Supreme Court heard its first sexual harassment case (*Meritor Savings Bank v. Vinson*) and ruled that a claim of hostile environment is actionable under Title VII. The Court noted that while not bound by the EEOC guidelines, it was appropriate to look to them for guidance. In its decision, the majority accepted the ruling in *Rogers* that “...Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult”(p. 65). While accepting the hostile environment action the Supreme Court also delineated the boundaries of such a claim.

"For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment" (p. 67). However, it still remained for the lower courts to decide what constitutes an "abusive working environment."

Traditional legal analysis systematically excludes the life experience of most women. This is especially the case for women of color. The assumption of a white male norm in legal language and doctrine perpetuates a system which is ill equipped to incorporate black women's experience. Employment discrimination doctrine continues to principally rely on the "but for" framework and assert that Title VII provides a cause of action for either race or sex discrimination, but not both. The tendency of courts to dichotomize race and gender foreshadows a significant problem in the hostile environment doctrine which does not address the needs or experiences of women of color:

[T]he paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged Blacks. Notions of what constitutes race and sex discrimination are, as a result, narrowly tailored to embrace only a small set of circumstances which do not explicitly include the experiences of Black women (Crenshaw, 1990 p. 201).

Davis and Wildman (1992) assert the power of racism as the status quo. By denying the significance of race during the Thomas/Hill hearings, the Senate judiciary committee used race as a "phantom-word," in which racism becomes more powerful because it is implicit and yet denied: "The rendering invisible of Professor Anita Hill's race, its exclusion from a discussion of her sexual harassment charge, meant racism/white supremacy was not discussed. Professor Hill made her charge as an African-American woman in a society dominated by white male values. The erasure of her race allowed

racism to act as a phantom once again” (pp. 1382-1383).

In sexual harassment law, race continues to act as a phantom. Traditionally, Title VII claims must articulate either discrimination based on race or discrimination based on sex. The continued reliance on a discrimination doctrine based on the experiences of white men serves to deny the social reality of black women and their experiences of discrimination. Cathy Scarborough (1989) asserts that the laws designed to eliminate discrimination in the workplace often create additional difficulties for black women:

Black women must use legal remedies and strategies that were designed for others. Whenever the legal system has attempted to deal with the problems Black women face in the workplace, it has consistently ignored their social history and failed to truly understand their experiences or address their concerns....The difficulties Black women face in the American legal system have their roots in a society that has historically avoided considering Black women as whole persons (p. 1457-1458).

This dis-aggregation of race and sex forces black women to fragment their identities and experiences to conform to a legal standard. “African-American women by virtue of our race and gender are situated within at least two systems of subordination: racism and sexism. This dual vulnerability does not simply mean that our burdens are doubled but instead, that the dynamics of racism and sexism intersect in our lives to create experiences that are sometimes unique to us” (Crenshaw, 1992 p. 1467-1468).

In hostile environment cases, forcing a division between claims of race and sex discrimination can have a detrimental impact on the ability of a plaintiff to demonstrate that the harassment was sufficiently severe to rise the level of a hostile environment. Courts that insist plaintiff’s make independent claims of racial and sexual harassment have shown a tendency to focus on racial discrimination and ignore the ways racism is sexualized in the harassment of black women. In the case *Clay v BPS Guard Services*

(1993) defendant successfully moved to strike the portion of the complaint related to sex. The court was unwilling to accept plaintiff's account that being continually referred to as "nigger bitch" constituted both racial and sexual derogation. In addition, the court found that BPS' non-discriminatory treatment of white female employees undermined Clay's claim of sex discrimination. This approach not only inadequately describes the experiences of black women, it often serves to weaken their legal claims of discrimination:

Thus in the case of a Black woman who has experienced interactive harassment, the offending conduct must first be divided into two categories: those actions based on race and those based on gender...The problem with this method of analysis is that it requires a court to separate two wholly intertwined characteristics of Black women without any standard for doing so and may prevent a Black woman from recovering simply because she is Black and female (Dennis, 1996 p. 570).

A major turning point for hostile environment doctrine came in the controversial Ninth Circuit decision in *Ellison v. Brady* (1991) in which the court argued for the use of a gender specific standard. The *Ellison* court emphasized the important differences in perspectives and experiences between women and men and highlighted the flaws inherent in a gender neutral reasonable person standard:

Because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior....Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive....We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women (p. 879).

In 1993, the New Jersey Supreme Court made a strong argument for a gender specific standard in the case of *Lehmann v. Toys 'R' Us*:

We believe that in order to fairly evaluate claims of sexual harassment, courts and finders of fact must recognize and respect the difference between male and female perspectives on sexual harassment. The reasonable person standard glosses over that difference...and it also has a tendency to be male-biased, due to the tendency of courts and our society in general to view the male perspective as the objective or normative one...Two societal realities may underlie the difference in male and female perspectives. First women live in a world in which the possibility of sexual violence is ever-present...Second, in many areas of the workforce, women still represent a minority and are relatively recent entrants into the field...That can make a women's position in the workplace marginal or precarious from the start. Sexual harassment operates to further discredit the female employee by treating her as a sexual object rather than as a credible co-worker (614-615).

In this case the justices were able to look beyond the traditional legal doctrine and articulate the importance of incorporating "societal realities" into the law.

Although most courts have rejected the gender-specific, reasonable woman standard articulated in *Ellison*, there has been some acceptance of a subjective reasonable person standard in determining what constitutes hostile environment. The Third Circuit decision in *Andrews v. City of Philadelphia* (1990) established a five pronged standard that is often cited:

the employee suffered intentional discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected plaintiff; (4) the discrimination would detrimentally affect a *reasonable person of the same sex in that position*; [italics added] and (5) the existence of respondeat superior liability (p. 1482).

In the case of *Stingly v. Arizona* (1992), the court cited *Ellison* in its assertion that "the proper perspective from which to evaluate the hostility of the environment is the reasonable person of the same gender and race and color standard" (p. 428). In addition, the *Stingly* decision found that "evidence of racial hostility may be aggregated with evidence of sexual hostility in determining the extent to which the environment is hostile to the plaintiff" (p. 428). In this respect, sexual harassment doctrine has made some progress toward the recognition of intersectional discrimination. "The acknowledgment

in *Hicks* and *Stingly* that black women may be differently situated than white women with respect to proving a sexual harassment claim reflects a recognition that even as women - that is those who are claiming sexual harassment - claimants are constructed by race as well as gender" (Abrams, 1994 p. 2501).

Despite this significant body of case law, the subjective standard which takes into account the race and gender of the "reasonable person" has not become the law of the land. In 1993 the Supreme Court heard the case of *Harris v. Forklift Systems*. The *Harris* decision avoided deciding the question of what is the appropriate measure of reasonableness. The Court ruled that "So long as the environment would reasonably be perceived, and is perceived as hostile or abusive, [citations omitted] there is no need for it also to be psychologically injurious" (p. 302). However, in the case of *Oncale v. Sundowner* (1998) the U.S. Supreme Court moved closer to a subjective reasonable person standard by incorporating "social context" into sexual harassment doctrine:

We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiffs position, considering 'all the circumstances' [citations omitted]...that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target...The real social impact of workplace behavior often depends on a constellations of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish...conduct which a reasonable person in the plaintiffs position would find severely hostile or abusive (p. 4).

The court's discussion of social context seems to leave the door open for lower courts to include issues of race and gender as well as class and workplace environment. However, it is worth noting that *Oncale* is a man who was harassed by other men in the workplace,

a situation which represents only a small proportion of sexual harassment cases.⁴

Unfortunately, the 1998 Supreme Court decisions in *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth* have the effect of moving legal doctrine further from the reality of women's experience. The *Faragher* and *Ellerth* cases established an affirmative defense against liability for sexual harassment if the employer can show, "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" (524 U.S. at 745).⁵

In these decisions, the Court not only assumes that employer policies and complaint procedures actually have the effect of preventing or reducing harassment, an assumption which there is no empirical evidence to support, but also requires the plaintiff to utilize employer's internal complaint procedures. This despite a significant body of research which shows that the majority of women who are sexually harassed reasonably decide to forgo such internal procedures:

The available empirical research, in short, reveals an understanding of women's responses to sexual harassment quite different from the doctrinal and normative frameworks *Faragher* constructs. This literature suggests not only that the reporting of sexual harassment through official channels is rare, but also that women select from a wide range of less drastic and arguably quite "reasonable" response modalities in their attempts to cope with sexualized conduct in the workplace...Importantly, what may appear to sexual harassment researchers, employers, or federal judges as the passive response of ignoring the harassing behavior or the harasser, may actually signal the use of active, but internally

⁴The EEOC reports that in 1997 11.6% of sexual harassment charges were filed by men, in 2006 the rate of filings by men reached its highest at 15.4%.

⁵This defense is available to employers only if no "tangible employment action" is evident: "The employer is strictly liable when the harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment" (Ellerth at 765).

focused, coping mechanisms (Krieger 2001 p.181).

Lower courts have largely interpreted these decisions to give employers the benefit of the doubt by assuming that the existence of sexual harassment policies serves as an insulation from liability, and by creating an additional obstacle for victims of harassment who are reluctant to use internal reporting procedures.

Research Project and Methods

The case law provides a very limited picture of how the legal system handles sexual harassment complaints. We know that only a small fraction of the women who say they have experienced harassment file any type of formal complaint. Even among the women who file complaints against sexual harassment, a significant number never advance to a legal challenge since complaints filed within the workplace are often resolved or dismissed by internal complaint procedures. Of those who move through the process to file with a city or state agency, very few find resolution through the legal system.

According to the EEOC disposition of sexual harassment charges for the fiscal year 2000 (the year most of my interviews were conducted), of the 15,836 cases filed with the agency only 10.7% resulted in a finding of reasonable cause and 7.3% disposed of with a “right to sue letter” for the plaintiff.⁶ According to this data, of the almost 16,000 cases files with the EEOC that year, approximately 1,000 have the opportunity of moving into the courts, provided the plaintiff is able to retain an attorney and chooses to

⁶ 44.1% were dismissed with a finding of “no reasonable cause,” 27.7% were closed for administrative reasons, 8.3% were withdrawn and 10% were settled with EEOC assistance.

continue with her case. Once filed as a civil case, the winnowing process continues, and most legal experts agree that approximately 90% of civil cases are settled before trial. Therefore, any study of sexual harassment based on legal doctrine or judicial outcomes is only looking at a very small portion of the story.

Our understanding of the legal process must go beyond doctrine and case law. Individual actions and societal attitudes are formed by and inform the law. A greater understanding of this reciprocal process requires a greater understanding of the individuals who turn to the law and their experience with the system. This research project examines legal consciousness in the context of legal mobilization and the particular experience of sexual harassment in the workplace. Through this research, I explore the ways legal consciousness and legal mobilization are informed by specific social, cultural contexts and experiences, and how the underlying beliefs and ideas that citizens have about law and legal institutions inform and are informed by individual interaction with the legal system.

Legal consciousness research is based on the presumption that the law has an impact far beyond the courtroom and legal institutions. Scholars of legal consciousness examine how people think about, conceptualize and apply legal concepts and language. Law is part of the social construct and as such affects social relations and interactions. In order to understand how the law informs and influences social attitudes we must look beyond the case law and legal actors and institutions. The focus on legal consciousness research is on individual citizens. Survey data can provide important baseline information on attitudes about law, but such approaches are insufficient to get to the heart of legal consciousness, which is not a fixed set of attitudes, but rather an ideology which is

expansive, contradictory and constantly shifting. A more nuanced and complex understanding of legal consciousness can only come about by listening to individuals tell their own stories: “In order to discover the presence and consequence of law in social relations, we must understand how legality is experienced and understood by ordinary people as they engage, avoid, or resist the law and legal meanings” (Ewick and Silbey, 1998 p. 35).

My research examines the ways in which legal consciousness evolves with personal experience as individuals interact with legal actors, legal language and legal rules. For this project I rely on the narrative accounts of women who experienced sexual harassment in the workplace and filed a complaint. The data consists of in-depth interviews with a dozen women who filed some form of sexual harassment complaint. These in-depth interviews allow the respondents to describe their own experiences and tell stories about their legal encounters in their own way. Narrative is one of the primary ways humans make sense out of their experience. Storytelling is a natural mode of communication, it provides a form through which individuals can express their understanding of events and experiences. Ewick and Silbey (1998) explain the importance of narrative accounts in their study. “We adopted the concept of narrative because people tend to explain their actions to themselves and to others through stories...In other words, stories people tell about themselves and their lives both constitute and interpret those lives; the stories describe the world as it is lived and is understood by the storyteller” (p 28- 29).

Feminist jurisprudence articulates the ways in which male dominance and patriarchy are embedded in our legal and social systems. As such, the experiences of

those who fail to approximate a white male norm, including women, minorities and the underclass are often disregarded. Feminist scholarship asserts the importance of avoiding replacing the traditional white male norm with another equally abstract norm which reflects only a small set of experiences. This project examines women as complete beings, taking into account their lived experience and social context, and rejects traditional notions of neutrality and objectivity as illusory. The decision to use in depth interviews for this project is intended to allow respondents to articulate their own understanding of legal concepts and language as well as their own particular social context and life experience. “In-depth interviewing’s strength is that through it we can come to understand the details of people’s experience from their point of view. We can see how their individual experience interacts with powerful social and organizational forces that pervade the context in which they live and work...” (Seidman, 1986 p. 102)

I limited my respondents to women who have filed sexual harassment complaints, because I hope to gain an understanding of the interrelationship between legal consciousness and legal actions. Whether they filed a case in court or through formal procedures of their employer, these women have distinguished themselves from the majority of women who experience harassment in that they have chosen to mobilize the law on their own behalf. In order to recruit respondents for this study I composed a brief survey (see appendix A) about sexual harassment to be filled out anonymously. Since my primary objective was to identify individuals who would be willing to be interviewed for this project, a section at the end of the survey asked respondents to include their contact information if they were willing to be interviewed about their experience.

It became apparent at the outset of this research project that legal structures and

institutions are complicit in silencing the voices of women who file sexual harassment complaints. Sexual harassment settlements routinely include confidentiality agreements which forbid plaintiffs from talking about their experience. When I contacted lawyers from the New Jersey Division of the National Employment Lawyers Association I found that very few of the lawyers I contacted were willing to distribute my survey to their clients, even though I explained that my research was not about the settlement process, but rather about the experience of filing a complaint and I assured them that all responses would be kept strictly confidential and that neither the name of the employer or the client would be mentioned in the final report.

In my efforts to implement this research this project, I discovered that the system is designed to limit both information and access to victims of harassment. Legal entities assiduously work in concert with bureaucratic systems designed to make it very difficult to identify women who file sexual harassment complaints. This system is allegedly designed to protect the anonymity of the women who come forward. However, in fact it serves to protect employers from being identified as defendants in sexual harassment complaints. The city and state agencies I contacted, which handle sexual harassment complaints, refused to distribute my survey on the grounds of protecting the anonymity of the plaintiffs. The Philadelphia Commission on Human Relations and the New Jersey Division of Civil Rights refused to distribute my survey. The New York City Division of Human rights failed to answer my correspondence or return my phone calls. The single exception was the Philadelphia office of the EEOC, which agreed to distribute my survey with their intake paperwork, but only if I agreed to remove the section which provided respondents an opportunity to include their contact information. By excluding the section

which gave respondents the option of agreeing to speak to me further about their experience, rather than protecting the rights of the complainants, the EEOC enforced their anonymity and diminished their ability to take action on their own behalf.

Even organizations specifically intended to support women, such as the NOW legal defense fund in New York City and the Women's Law Project in Philadelphia, which provide a telephone counseling and information service for sexual harassment victims, refused to assist in any way with the project. Their refusal to distribute my survey was once again couched in the language of protecting the privacy of the victims, even though I included an option to reply to the survey anonymously and a business reply envelope.

I was initially reluctant to rely women's rights groups to distribute the survey because I was concerned about a selection bias that might be apparent if I contacted respondents through feminist oriented organizations. However, as the difficulty of obtaining respondents for this project became clear, I overcame my initial reluctance. Ultimately, I obtained half of my respondents through Women's Rights at Work, a division of Citizen Action of New York. They agreed to distribute my survey to their mailing list, as well as at their monthly educational forums about sexual harassment.

Because I had to rely on third parties to distribute my surveys, I cannot measure the response rate since I had no way of confirming that the surveys I mailed out were actually distributed to potential respondents. Between 1999 and 2001 I received 75 returned surveys. Despite the fact that the system works so hard to protect the anonymity of these women, the majority of the women who filled out my survey included their names and telephone numbers. Of the 75 only 22 did not include their contact

information (nine of the 22 came from the EEOC, where the option was not available). In fact, one of the respondents who received and returned the anonymous survey from the EEOC actually took the initiative to contact me. Another respondent wrote in the section for name and contact info, "I'm sorry. The settlement agreement doesn't allow me to talk about it. I could only fill out this paper because it was anonymous. Good luck in your study. It is a heartbreaking situation for those who experience it - your work is so important."

Out of the total 75 surveys returned, four were illegible or inappropriately filled out, 22 had no contact information and 12 were excluded because they did not file a complaint. I was left with a pool of 37 surveys from which to recruit interview subjects. However, the nature of the distribution method as well as the life situations of the women themselves made it difficult to contact many of the respondents. Sixteen respondents had either moved or changed their phone number (as a result of the experience of harassment or filing a complaint many women end up quitting their jobs or being fired, and therefore may need to relocate). The final five surveys were returned in the summer of 2001. Since most of my respondents from Women's Rights at Work lived and worked in New York City, I did not feel it was appropriate to call and request interviews in the wake of the September 11th attack on the World Trade Center. I was ultimately able to contact sixteen of the respondents and twelve agreed to be interviewed for this project.

The first three interviews were conducted in person and the remainder were conducted by telephone. The majority of the interviews lasted between 45 minute to one hour, although a couple of interviews lasted over two hours. Three of the respondents called me back one or more times to discuss aspects of their case. Contrary to the

assertions of lawyers and EEO officers, the women I got in touch with were very willing to talk about their experience. In fact, most of them seemed to appreciate having an opportunity to tell their stories.

I developed an interview script (see appendix B), with particular questions related to my inquiry. However, since my goal was to delve into respondent's consciousness, it was critical to allow the respondents to tell the stories in their own way and to avoid communicating expectations or assumptions through my questions. The interviews were unstructured, and evolved organically according to the comments of the respondents. I began each interview by asking respondents to describe the harassment experience that eventually led to the complaint and allowed them to tell their stories uninterrupted. I would then ask them to expand on, describe or explain certain aspects of their experience. All the interviews were recorded and transcribed. I used the software NVIVO 7 to code and analyze the transcriptions.

My respondents come from a variety of backgrounds, professional and educational experiences. Five of the respondents are black, six are white and one is latina. The majority have at least some college education, three are college graduates, one has a professional degree, one is a high school graduate. Only one of the respondents is unmarried, six being never married, four divorced and one widowed. (There is evidence to suggest, and certainly my respondents agree, that single women are more likely to be harassed, and when harassed are less likely to quit, especially if other people are dependent on their income). Eight of the twelve respondents are the sole income earner in their household and only one reported a personal income over \$49,000 annually. Four of

these women were fired for daring to file a complaint, five quit because the stress and anxiety became too much to bear, and four are still toughing it out in a very difficult situation at the workplace, but are reluctant to give up the job security they have attained. Of the four who continue to work where they are/were being harassed, two have been demoted and all are continuing to suffer reprisals and retaliation in response to their lawsuit.

Chapter Overview

This project examines legal consciousness as a fluid set of beliefs and actions which derive from cultural practice and the construction of social relations. I examine the ways in which my respondents think about the law and legal concepts in ways that encourage them believe that law is an appropriate recourse that can provide a solution to their problem. I also explore the ways in which legal consciousness changes with personal experience as individuals interact with legal actors, legal language and legal rules. The women in this study turn to the law with a belief that law matters, and are faced with a combination of inherent sexism of legal doctrine and process, the inability of law to change social attitudes, and an existing power structure which places them in a disadvantageous position. In the following chapters, I delve into the experiences and attitudes of respondents and use their stories to expand our understanding of the power and limitations of sexual harassment law to change social attitudes and behavior.

Chapter two provides an overview of the two major bodies of research on which this project is based; the legal consciousness literature and feminist jurisprudence. I review the shifting focus of socio-legal studies, which strives to examine the impact of

law on social structures and attitudes, from an emphasis on legal institutions and outputs to what has been termed the “constitutive” view of law, in which law is understood as a form of knowledge and power that establishes and informs social relations and social structures. As such, law constitutes a social order and belief system which is imbedded in and perpetuated by a certain power structure, yet by its very nature, the law also creates opportunities for resistance. I also review feminist jurisprudence critique of law. A feminist analysis suggests that sexism, sexual oppression and patriarchy are so ingrained in the legal system that laws which attempt to rectify centuries of discrimination exist on a plane far removed from the real life experiences of most women. By articulating and challenging the inherent sexism and racism of law, feminist scholars create an opportunity to displace traditional notions of sex and gender and expand the concept and legal definition of equality.

Chapter three begins the process of using the stories of the respondents to explicate our understanding of sexual harassment and sexual harassment law. This project is based on the assumption that individual lives and experiences are critical to their understanding of and relationship with law. Accordingly, I provide a brief description of each of the twelve respondents in this chapter. I believe, in order to understand the complexity of legal consciousness, it is important for the reader to view these women as whole persons rather than merely examples or statistics. This chapter explores the question of why so few victims of sexual harassment file any type of formal complaint. I utilize the framework developed by Felsteiner, et al (1989) called “naming, blaming and claiming” to examine the experiences of my respondents as they transform the experience of harassment into a legal claim.

Chapter four focuses on the experiences of my respondents as they move forward in the process to engage the legal system. I take a closer look at some of the obstacles and difficulties women face when attempting to file a complaint about sexual harassment. In this chapter I focus on the “gatekeepers”- individuals and structures which have the power to control access to the law. This chapter examines how the power structure in the workplace as well as sexual harassment policies often serve to minimize or diffuse complaints before they can become legal claims. I also focus on the role and power of lawyers as gatekeepers of the legal system and the ways in which their encounters with respondents served to impact women’s attitudes about the law and their ability to continue with their claim.

Chapter five explores the transformation of legal consciousness that takes place as women attempt to engage the legal system on their behalf. This chapter focuses on the phenomenon of the paradox of law (the disjunction between the ideal of law as the champion of equality and justice, and the reality of law as inherently biased, situated within, and reinforcing an existing unequal power structure) and how it is implicated in legal consciousness. I identify and explore the contradictory ideas and attitudes that my respondents hold about law. The “myth of law” reflects an idealized version of law, a recognition of the symbolic power of the law which exists alongside the understanding that legal institutions are part of the larger power structure which is complicit in the subjugation of women. The myth of law exists alongside another aspect of respondents legal consciousness which I term “the game of law,” which is the realization that individuals come to the law differently situated and with different skills and abilities to navigate the system. The rules of the game are not equally understood by all, and for

some, just getting into the game presents a major difficulty.

Chapter six offers some concluding observations and suggestions for further research. The evolution of sexual harassment law and imposition of sexual harassment policies has made sexual harassment “politically incorrect” but the practice remains ubiquitous. This chapter examines the ways in which my respondents experience with sexual harassment and the legal system reinforces an understanding of the institutional oppression of women. I also explore the significance of legal mobilization as an act of resistance and how that is indicated in the legal consciousness of my respondents.

CHAPTER 2: LOOKING FOR A FEMINIST LEGAL CONSCIOUSNESS

This chapter will provide a brief overview of two bodies of research that inform this research project. First, I review the changing perspective of law and society research from an instrumental view of law to the view of law as an integral part of society. This more expansive view of the role of law in society has led to the study of legal consciousness, which is the focus of my research relates as it relates to sexual harassment complainants. Next, I review some of the groundbreaking work of feminist legal scholarship, which has challenged the assumptions and process of the legal system as contributing to a patriarchal power structure. My project builds on this work by examining the space between law and women's lives at the individual level. I investigate the importance of legal consciousness for women's relationship to law and the potential of women to challenge the entrenched legal and social power structure. My work continues to explore the opportunities for, or limitations on, the ability of women to use the law as a form of power to challenge the status quo and create social change.

Shifting Views of Law and Society

Studies in the field of Law and Society focus on how, and to what extent, law influences social attitudes and/or creates social change. In their edited volume Law and Everyday Life (1993) Sarat and Kearns describe two distinct perspectives of law which form the basis for most law and society research. These two perspectives; the instrumental and constitutive, represent two basic views of the relationship between law and society. Instrumentalist scholarship, which sees law as somewhat distinct from, and acting upon society, generally focuses on legal norms, legal rules, and legal actors in an

attempt to discern the power of law as a tool for creating or sustaining social change. This research endeavors to "... search for the conditions under which law is effective, that is, when legislation or judicial decisions can be counted on to guide behavior or produce social changes in desired ways" (Sarat & Kearns, 1993 p.27).

In his classic work, The Politics of Rights (1974), Scheingold argues against the idea that litigation and courts decisions can produce effective social change. He asserts that this view represents an oversimplification of the relationship between law and social structures:

The assumption is that litigation can evoke a declaration of rights from the courts; that it can, further, be used to assure the realization of these rights; and, finally, that realization is tantamount to meaningful change. The *myth of rights* is, in other words, premised on a direct linking of litigation, rights, and remedies with social change (p. 5).

Scheingold suggests that the legal paradigm which views human interaction largely in terms of rules and rights dominates the ideology of the myth of rights and mischaracterizes the interplay of legal, political and social forces in America. In fact, Scheingold rejects the myth of rights and presages the constitutive understanding of law and legal mobilization as he moves from the myth of rights to his discussion of the political significance of the ideology of rights. He puts forward the concept of the *politics of rights*: "The politics of rights implies a much more comprehensive assessment which includes but transcends the simple straight-line projection from judicial decision to compliance." (p. 8) Scheingold is skeptical of the emphasis on litigation as a tool for redistributing power. He notes the tendency of law and politics to reinforce the status quo, embedded as they are in the existing power structures. Nevertheless, he asserts that the ideology of rights can play a significant role in mobilizing action. "The myth of rights

provides political ideals [which] influence the behavior of government and private citizens. The politics of rights is, in short, concerned with the interplay between ideology and action in American politics” (p. 83).

It is the recognition of the relationship between law, politics, ideology and action that characterizes the constitutive view of law and society. According to Sarat and Kearns (1993):

Constitutive theories of law reject the instrumentalist picture of law as external to social practices...They seek to trace the way legal power and legal forms exist in social relations...Constitutive theories claim that instrumentalism produces a distorted picture of the role of law in everyday life. By focusing on law as a discrete tool, or efforts of law to change behavior, instrumentalism diverts attention from the deep, often invisible, but pervasive effects of legal concepts on social practices (p. 50).

The constitutive approach to law and society research recognizes that law is informed by political and social norms in a reciprocal, interactive process. Law exerts a dynamic and at times paradoxical force on social attitudes and actions. Just as the law often structures and delineates certain interests, citizens can change the social structures through a re-articulation of law. Zemans (1983) asserts that legal mobilization provides a unique mechanism for individuals to invoke the authority of the state on their own behalf. “In many instances legal mobilization is generated not by the writing of new laws, but by changing social perceptions of the nature of a problem and the appropriateness of the intervention of state authority” (p. 697). This is, of course, the case with sexual harassment law. As we have seen in the previous chapter, the law of sexual harassment required a re-examination of the concept of discrimination as well as reconsidering the division between personal and legal issues.

The understanding that legal concepts and legal language can have an impact

beyond court decisions and their implementation has informed research on legal mobilization. McCann, in his exceptional study of legal mobilization in the pay equity movement, *Rights at Work* (1994) takes this constitutive approach. McCann asserts that law is not simply a set of abstract concepts which inform our attitudes and preferences. Legal knowledge and legal conventions have an impact on social relations and the choice of actions for individuals and groups. "...law is rarely an exclusive force in actual social practice, whether for judges on the bench or citizens in the street. Rather, legal conventions usually constitute just one highly variable dimension in the complex mix of interdependent factors that structure our understandings and actions" (p. 9).

McCann finds that legal mobilization is an interactive and dynamic process. On the one hand, legal knowledge and legal concepts can influence how citizens understand and interpret conflict, on the other hand, law and legal discourse are informed by individual attitudes and experiences. McCann stresses that legal discourse and citizen's understanding are an important component in this dynamic. He refers to "rights consciousness" which may give rise to certain expectations or aspirations. "*Legal (or rights) consciousness* in this sense refers to the ongoing, dynamic process of constructing one's understanding of, and relationship to, the social world through use of legal conventions and discourses" (p.7).

How one thinks about law can have a significant impact on whether, and how one seeks to use the law, as Bumiller shows in *The Civil Rights Society* (1988). Bumiller seeks to explain the apparent failure of anti-discrimination doctrine by opposing the instrumental conception of law with an examination of how individual attitudes and behavior can serve to undermine the ostensible goal of civil rights legislation and

litigation. She posits that the traditional model of legal protection, which presupposes law to be a powerful tool to end discriminatory practices, is flawed because it fails to take into account the way individual actions and attitudes are influenced by law:

The model of legal protection reinforces a view of law and society in which the social and political realm is distinct from, and subordinate to, the legal. This view of the primacy of the legal order creates the illusion that law is a source of power and authority disconnected from other power structures in society...The deep logic of the law does not reflect the complex social reality of discrimination in society, but rather confines legal resolution to social problems appropriate for litigation (p. 10).

Bumiller rejects the traditional model of legal protection and relies on stories told by victims of discrimination to explore the ramifications of anti-discrimination law. She creates a paradigm for legal consciousness research by opposing the perspectives and experiences of individuals against the traditional, instrumentalist view of legal protection in an effort to better understand the relationship between law and social change.

Bumiller's perspective on the role of law derives from Foucault's account of law and social control:

Foucault's conception of law and ideology moves us away from the conventional view of anti discrimination law as a command directed at its perpetrators to recognition of the law as a form of knowledge and power that influences its subjects...This raises the question of how law exercises its authority on victims and produces victims views of themselves and their situation (p.33).

The crucial claim of the constitutive approach to the study of law is the assertion that, "Law exercises its power by less obvious means than can be discerned from formal and visible decision making in court" (p. 37). Bumiller finds compelling evidence of the reciprocal nature of law as constitutive of social relations and the importance of examining the gap between legal doctrine and law in everyday life. She asserts the power of legal ideas and concepts to influence social relationships even in the absence of a legal

claim:

When beliefs about law, legal concepts, and issues of rights and wrongs become salient to a social conflict, the 'legal theme' influences communication and perceptions of the incident...the situation is transformed by the introduction of law even if the parties do not speak to lawyers or bring the case to a legal forum... The intervention of law changes the balance of power within social relationships. The introduction of legal themes may influence behavior at all stages of the conflict - from its initiation to its resolution (p. 36).

The theoretical shift from the instrumental view of law to the constitutive view of law directs scholarship toward a recognition of the importance of examining the ways that law emerges out of and is constituted by specific historical, cultural, social situations and attitudes. Discrimination is ultimately a social, rather than a legal, problem - premised on centuries of social and cultural stereotypes and beliefs. Decades of research on race and anti-discrimination law has shown that creating a legal definition and response to discrimination is not, in and of itself, a solution.

The shift in our understanding of the meaning of law requires a significant shift in the way we study the relationship between law and society, from a focus on institutions to individuals. Accordingly, Bumiller asserts the importance of interviewing individual subjects about their thoughts and experiences with law. "An important premise of this book, therefore, is that neither the potentialities nor the troubles deriving from social conflict can be fully understood outside the changes of an individual life" (35).

Constitutive studies of law have led to the understanding that law is more than a set of rules and procedures, law constitutes a belief system which is imbedded in, and perpetuates, a certain power structure. It is the study of law as a set of beliefs, and the implications of those beliefs, that forms the basis of legal consciousness research. Like Bumiller, I look to the experiences of individual citizens for insight into the question of

law's ability to affect social change and to understand the viewpoint of those who would challenge the existing power structure.

Legal Consciousness Research

Legal consciousness research emerges out of the constitutive view of law in which law is seen as an integral part of social relations rather than an external autonomous force. Legal conflict can describe and constrain social relations, or redefine basic power relations. Beliefs about law pervade our social consciousness, from TV shows about law to real life legal battles that become television shows. In order to understand how law operates as an aspect of social life, we must examine how people consciously or unconsciously invoke and interpret legal language, authority, and procedures as they go about their daily lives. This is the project of two major studies of legal consciousness; Sally Merry's *Getting Justice and Getting Even* (1990), a study of legal consciousness among working class Americans, and Ewick and Silbey *The Common Place of Law* (1998), an examination of legal consciousness in the context of everyday life. Legal consciousness research strives to examine how law is invoked in social relations and how individual attitudes and experiences inform ideas about law and legal authority. "Law works in the world not just by the imposition of rules and punishments but also by its capacity to construct authoritative images of social relationships and actions, images which are symbolically powerful. Law provides a set of categories and frameworks through which the world is interpreted" (Merry p. 8).

The study of legal consciousness requires a shift in focus away from legal institutions and toward individual citizens. Ewick and Silbey assert:

If the law is now understood to be an internal feature of social situations, rather than simply an autonomous force acting upon them, we also need to understand how and in what ways these very same situations are constructed by something we call law. In other words...our theoretical question shifts away from tracking the causal and instrumental relationship between law and society toward tracing the presence of law in society (p. 35).

Scholars of legal consciousness gather information about the way people think about, conceptualize and apply legal concepts and language by allowing respondents to articulate their own understanding of law and its significance. These projects emphasize the importance of allowing individuals to describe their own views of law and tell stories about their legal encounters. “In order to discover the presence and consequence of law in social relations, we must understand how legality is experienced and understood by ordinary people as they engage, avoid, or resist the law and legal meanings”(id. p. 35).

This conceptualization of legal consciousness forms the basis of the current project. The aforementioned studies indicate that much can be learned from examining the ideas and experiences of individual citizens with respect to law. In listening to and examining individual citizens’ accounts of their thoughts about and encounters with law, these authors articulate two critical findings about legal consciousness. The first is that legal consciousness is not a fixed set of attitudes, but rather a flexible set of beliefs and ideas about law which respond to, and are shaped by, social context and individual experiences. Ewick and Sibley posit a reciprocal and constantly shifting relationship between legal norms and concepts, attitudes about law and legality, and individual actions and experiences. “In this theoretical framing...consciousness is not an exclusively ideational, abstract, or decontextualized set of attitudes toward and about the law. Consciousness is not merely a state of mind. Legal consciousness is produced and

revealed in what people do as well as what they say...We understand consciousness to be formed within and changed by social action” (p.46). Legal consciousness is understood to be a fluid set of beliefs and actions which derive from cultural practice and the construction of social relations, and are subject to change as a result of individual experience.

Legal consciousness is constantly shifting, it develops and evolves through individual experiences and interaction with the legal system. According to Merry, legal consciousness is formed within, and in response to, social structures and relationships:

Consciousness develops through individual experience. But this experience takes place inside structures which define people’s lives. Further, it changes with contradictory experiences...The legal consciousness I observed changed as plaintiffs went to court and observed contradictions between what happened and what they expected. In general, people have the possibility of creativity and resistance, of changing their consciousness as they test it against the experience of everyday life (p.5).

An important component of individual experiences is that they take place within a particular social, cultural context, which informs understandings of, and experiences with,

the law. “Legal consciousness, as part of culture, partakes of both the particularity of a situation and the overall context in which it is considered. Moreover, as in any facet of culture, understandings of law are not consistent, but develop through experience” (Merry p.5).

Other scholars have found support for the assertion that legal consciousness is informed by individual experiences and perspectives. Albiston’s 2005 study of employee efforts to mobilize rights under the Family and Medical Leave Act shows that such actions are informed by established practices in the workplace and institutionalized

conceptions of work, gender, and disability. Gendered assumptions about work and family have a strong impact on how workers think about their situation and whether they choose to mobilize legal rights for family leave.

Marshall (2003) examined women's conception of their experience with sexual harassment and found that the different frames of reference, or schemas, they brought to bear on the situation informed whether or not they described their experience as harassment. Neilson (2000) examined attitudes about law and street harassment and found that group identity and experiences were strongly related to individual attitudes. Accordingly, white men tended to bring different experiences and perceptions to bear on their concept of legality than women and men of color. She asserts that social context and experience is an important component of one's understanding and expectations of law. "...the legal consciousness of ordinary citizens is not a unitary phenomenon, but must be situated in relation to particular types of laws, particular social hierarchies, and the experiences of different groups with the law" (p. 1056).

Another crucial finding of the legal consciousness literature is what I refer to as the paradox of law. The paradox of law is not simply the difference between law on the books vs. law in action, or the contradiction between individual expectations of and experiences with law. Ewick and Silbey (1999) find that legal consciousness of everyday citizens transcends the conventional dichotomy of law on the books vs. law in action:

In an important sense, then, we have moved beyond conventional distinctions between ideal and practices, law on the books and law in action. These distinctions enforce false dichotomies. Legality is composed of multiple images and stories, each emplotting a particular relationship between ideals and practices, revealing their mutual interdependence (p. 1040).

The paradox of law as articulated by legal consciousness scholars is seen in the

way law both empowers and constrains the individuals who seek to use it. Merry notes the paradoxical consequences of seeking a resolution through the courts. Citizens who look to law to empower themselves in conflict situations often find that their conflicts are restructured and redefined by legal norms, language and actors. In the process individuals lose control of the situation and their interpretation of events are often superseded by those of the legal system. “There is both power and danger in the use of the courts. There is power in wielding a potent weapon, one which is symbolically powerful and can have severe consequences. But there is danger of losing control of the weapon...women were particularly likely to find their problems reinterpreted as issues of character and emotion rather than of legal rights”(p. 3).

Merry describes the law as hegemony, which exerts its own form of cultural domination. She credits critical legal studies for contributing to a new, more nuanced understanding of law:

The critical legal studies movement, in particular, has challenged the role of law by asking how law, in an ideological as well as a directly coercive sense serves to buttress the power of the strong rather than to protect the rights of the weak ...Critical legal scholars, among others have suggested that law serves as an ideology with hegemonic characteristics - that it not only enforces compliance but also constructs a world which is accepted because it is legally ordered...(p. 7).

Yet legal authority, like effective political authority, relies to a large extent on the consent of the governed. Much of law's power derives from citizens' belief in its legitimacy, on the consent of the governed rather than the power of coercion. “Law works in the world not just by the imposition of rules and punishments but also by its capacity to construct authoritative images of social relationships and actions, images which are symbolically powerful. Law provides a set of categories and frameworks through which the world is interpreted” (Merry p. 8).

In order for the hegemony to be sustained the dominant ideology must incorporate elements which will appeal to subordinate groups, or it cannot maintain its legitimacy:

As an ideology, law contains both elements of domination and the seeds of resistance...Law, as an ideological weapon, has two edges: it is a source of domination and, at the same time, contains the possibilities of a challenge to that domination. It is not part of a hegemonic ideology in the simple sense of a set of beliefs which induce subordinate groups to go along. Instead, it is an ideology which becomes part of a struggle over control - and it is the language in which this struggle takes place and in which relative power is contested. Thus law constructs power and provides a way to challenge that construction (id p. 8).

Ewick and Silbey (1999) find that people simultaneously hold contradictory views of the law. They acknowledge the importance of the inherent contradictions in legal consciousness and assert that it is this very contraction apparent in the law which supports law's hegemonic power. "Rather than simply an idealized set of ambitions and hopes...legality is observed as both the ideal...as well as a space of powerful action. The persistently perceived gap is a space, not a vacuum; it is, in short, one source of the law's hegemonic power" (p.1040).

Merry describes finding that a broad sense of entitlements, rights and the belief in the power of the state to defend the powerless exists alongside an understanding of the inherent inequities in the legal system. She found among the plaintiffs in her study:

They go to court because they see legal institutions as helpful and themselves entitled to that help. They see the court as an institution which has a responsibility to protect their fundamental rights...rights they acquire as members of American society...But they are not naive about the extent of social and economic inequality within American society or about their relatively powerless position. Despite their recognition of their unequal power, the nevertheless think they are entitled to the help of the court" (p. 2).

My project relies on the conceptualization of legal consciousness as developed by these scholars. Legal institutions uphold traditional social structures and delineate certain

interests and power relationships, but also create an opportunity to change the existing social power structures and relationships. Citizens see law as reified as well as contingent and specific. Law's hegemony is sustained because people have conceptions of law which include the various contradictions within law. By looking at the experiences of women who have mobilized the law by filing sexual harassment complaints, my project examines legal consciousness in a way that integrates individual action with structural and institutional constraints.

Recent scholarship has taken a similar approach to studying legal consciousness and the implications of the social and legal structures in which the law is mobilized. Marshall (2005) analyzes women's legal consciousness in response to sexual harassment and the ways in which sexual harassment policies, grievance procedures and management responses to complaints can influence women's understanding of their experience of unwanted sexual attention and impact their responses. Albiston (2005) examines the ways the Family and Medical Leave Act shapes workers understandings of workplace rights, gender and family, and the reciprocal relationship between the social institution of work, power relations and the mobilization of legal rights.

In the case of sexual harassment, law serves the paradoxical role of reinforcing patriarchy and traditional gender based norms while at the same time providing an avenue to challenge those norms. The existence of sexual harassment law has created an opportunity for women to challenge the status quo - to name their experience and have it recognized as a legal wrong. However, despite increased numbers of sexual harassment cases filed and the existence of sexual harassment policies in many workplaces, there is no indication that sexual harassment in the workplace has declined. This contradictory

role of law as it relates to women's inequality and victimization is a primary focus of my analysis. This project builds on the existing literature on legal consciousness by re-examining the important question of the relationship between legal mobilization and social change and incorporating a feminist legal analysis of the role of gender and patriarchy in women's understanding of law.

Sex, Law and Power: Contributions of Feminist Jurisprudence

Feminist legal scholars articulate the ways in which dominance and patriarchy are embedded in our legal system. Like the political system, the law was designed by and for men; specifically white, upper-class men, as such it often fails to take into account or address the needs of women, people of color and the economically disadvantaged. The language and traditions of law were designed to exclude women. In addressing questions of difference and equality, feminists have been challenged to wrest the language of law from its patriarchal origins. This section will review the work of feminist legal scholars who assert that the hegemony of law serves to subvert equality and perpetuate the continuation of a male dominated social, legal and political culture. Any discussion of the hegemony of law must address questions of power. How are institutions set up to protect and support the entrenched power structure? How are certain groups continually forced to the margins and denied power? My project relies on feminist scholarship to understand how the hegemony of law undermines women's efforts to use the law to empower themselves. In my interviews with women who have filed sexual harassment complaints, I explore how the social structures of gender, sexuality and patriarchy are implicated in their conceptions of legality.

Feminist jurisprudence articulates how the ideology and practice of law supports a patriarchal system. The American legal tradition has historically excluded the needs and interests of women. As MacKinnon (1993) notes:

The law that is applied to...women has not been written by women, white or Black, rich or poor. It has not been based on women's experiences of life, everyday or otherwise. No one represented women's interests as women in creating it, and few have considered women's interest as women in applying it (p. 111).

Law has served to maintain women's subordination through two principal means. First, the establishment of two separate and distinct realms of action; the public spheres of politics and economics, which is controlled by men, and the private sphere of domesticity, inhabited by women and children. Second, the unassailability of the differences between men and women. Taub and Schneider (1982) assert:

...the law has furthered male dominance by explicitly excluding women from the public sphere and by refusing to regulate the domestic sphere to which they are thus confined...the law has legitimized sex discrimination through the articulation of an ideology that justifies differential treatment on the basis of perceived differences between men and women" (p. 151).

Feminist legal scholars and activists have worked to overcome these major obstacles to creating a voice for women in the law. In the decades since the second wave feminist movement there has been significant progress in the effort to incorporate women's experience into law. Changes in rape law and, more recently, establishment of domestic violence laws, has begun to fracture the wall between public and private which left many of the harms women endure beyond the reach of legal recourse. Sexual harassment has been described as the first legal wrong to be defined by women:

The goal of legal feminism has been to fit the cause of action to women's experience in the workplace. As a phenomenon, sexual harassment is virtually gender-specific...the great majority of sexual harassment plaintiffs are women, and their complaints rarely have a precise analogue in the experience of men"

(Chamallas, 1993 p. 38).

Feminist legal scholars contend that the ostensibly neutral, objective approach to law systematically excludes the perspectives of those most likely to be victims of harassment. Feminist jurisprudence rejects the traditional notions of “objectivity” and “neutrality” in law, asserting that they institutionalize a male dominated view of law and society and protect the status quo. “Feminist analysis begins with the principle that objective reality is a myth. It recognizes that patriarchal myths are projections of the male psyche. The most pernicious of these myths is that the domination of women is a natural right...” (Scales 1986 p. 42). In 1981 MacKinnon wrote that sexual harassment law ought to “...challenge the conception that neutrality, including sex-neutrality, with its correlate, objectivity, is adequate to the nonneutral, sexually objectified, social reality women experience. It urges the priority of defining women's injuries as women perceive them” (p. viii). A review of sexual harassment case law in the previous chapter showed how legal doctrine, based as it is on ideals of objectivity, neutrality and individual rights has overlooked or undervalued the experiences of women, especially women of color. These legal traditions support the dominant cultural perceptions about what is considered public and private, what is “normal” sexual behavior vs. discrimination, and have colored sexual harassment law.

Feminist jurisprudence strives to reject the language and logic of law, which does not leave room for women’s experience. The legal definition of equality was established in a system which viewed white males as the norm and rarely took women into account at all. Male dominance and patriarchy are so embedded in our social consciousness and power structures that the legal system has remained largely wedded to a notion of

difference which is biologically determined and therefore immutable:

...construing gender as a difference, termed simply the gender difference, obscures and legitimizes the way gender is imposed by force. It hides the force behind a static description of gender as a biological or social or mythic or semantic partition, engraved or inscribed or inculcated by god, nature...or the cosmos. The idea of gender difference helps keep the reality of male dominance in place (MacKinnon, 1987 p. 3).

Historically, the law reads equality to mean sameness, which means that women must approximate a male norm in order to be treated equally:

Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him....Approaching sex discrimination in this way - as if sex questions are difference questions and equality questions are sameness questions - provides two ways for the law to hold women to a male standard and call that sex equality (id. p. 34).

Whether for biological or social reasons, it makes little sense for women to be judged on the basis of how closely they approximate a male norm. Just as claims that the law should be “color blind” disregards 400 plus years of slavery and institutional racism, given the American legal and political history of defining sex and gender in ways that devalue and subordinate women, it makes little sense for the law to judge women on the basis of how closely they approximate a male norm.

Feminists have struggled to define women’s experience in ways that the law will recognize and to redefine law, legal language and legal norms in accordance with women’s experience. In so doing, we must challenge the assumptions that underlie fundamental legal concepts such as equality and difference. In order to change the laws and alter the power structure it is necessary to work within the existing institutional structures. Yet working within a system which was designed to perpetuate patriarchy, feminists have faced a daunting task. In order to change the legal landscape to include

women's experiences, feminist legal scholars are restricted by the necessity of adopting our arguments to those of the dominant discourse. A major challenge faced by feminist who strive to create social change through law is how to create legal claims of action for women without accommodating the current legal norms and language we wish to reject?

The dominant culture has established certain criteria for theories, for legal arguments, for scientific proofs - for authoritative discourse. These established criteria are the governing rules. If we want to be heard - indeed, if we want to make a difference in existing arenas of power - we must acknowledge and adapt to them, even though they confine what we have to say or implicate us in the patterns we claim to resist....litigators working for women's rights have discovered that unless we fit our claims into existing doctrines, we are unlikely to be understood, much less to succeed. Yet trying to fit women's experiences into categories forged with men in mind reinstates gender differences by treating the male standard as unproblematic" (Minnow, 1993 p. 392).

As long as the legal system approaches questions of discrimination from the framework of sameness and difference women will always be at a disadvantage. By defining women as different, the law relies on an understanding of equality which reifies the status quo and denies women true power through law. The necessity of categorization and the tendency of legal doctrine and discourse to reify socially constructed categories is what Martha Minnow (1990) terms "Dilemmas of Difference:"

The dilemma of difference grows from the ways in which this society assigns individuals to categories and, on that basis, determines whom to include in and whom to exclude from political, social, and economic activities....The dilemma persists when legal reasoning itself not only typically deploys categorical approaches that reduce a complex situation, and a multifaceted person, to a place in or out of a category but also treats those categories as natural and inevitable...Both the social and legal constructions of difference have the effect of hiding from view the relationships among people, relationships marked by power and hierarchy...by sorting people and problems into categories, we each cede power to social definitions that we individually no longer control (p. 21-22).

The dilemma of difference exemplifies the hegemonic power of law: law creates

knowledge, legal language establishes reality. In attempting to work within the legal system and change the law to establish greater equality, feminist scholars have to address the question difference:

Feminists legal scholars have devoted enormous energies to patching the cracks in the differences approach...Which differences between the sexes are or should be relevant for legal purposes?...In response to these questions, feminists have tried to describe for the judiciary a theory of 'special rights' for women which will fit the discrete, non-stereotypical, 'real' differences between the sexes (Scales 1986, p.41).

Scales suggests that feminists have been derailed from our project by succumbing to existing legal norms and trying to fit our claims into a flawed paradigm:

And here lies our mistake: we have let the debate become narrowed by accepting as correct those questions which seek to arrive at a definitive list of differences. In so doing, we have adopted the vocabulary, as well as the epistemology and political theory, of law as it is. When we try to arrive at a definitive list of differences, even in sophisticated ways, we only encourage the law's tendency to act upon a frozen slice of reality. In so doing, we participate in the underlying problem - the objectification of women (id. p. 41).

The debate over how to define difference leaves feminists mired in a legal concept which was never intended to include women or reflect women's experience. We must strive to create a legal framework which can address issues of inequality without reference to dichotomous values of sameness and difference.

MacKinnon, one of the pioneers in the development of sexual harassment law, asserts that rather than striving for an abstract ideal of equality, law should acknowledge the ways in which male dominance and female subjugation is perpetuated. We must reject the basic assumptions of legal and social knowledge that gender, defined by sex, reflect dichotomous differences rather than a social constructions of power, and address the basis of inequality, which is not about difference, but rather about the relationship between gender and power. In her critique of contemporary anti-discrimination doctrine,

MacKinnon (1987) articulates what she refers to as the “dominance approach” which shifts the focus from gender differences to that of power and hierarchy:

In this approach, an equality question is the question of the distribution of power. Gender is also a question of power, specifically of male supremacy and female subordination. The question of equality from the standpoint of what it is going to take to get it, is at root a question of hierarchy...The goal of this dissident approach is not to make legal categories trace and trap the way things are. It is not to make rules that fit the reality. It is critical of reality....It proposes to expose that which women have had little choice but to be confined to, in order to change it (p. 40).

Power in American law and society is inextricably tied to questions of sex, race and class. In cases of sexual abuse and sexual harassment, the relationship between sex and power is clear.⁷ Degrading and insulting comments about women such as “they can’t do the job” and “they don’t belong here” as well as refusal to advance women on the basis of gender is a reflection of the sexual power dynamic in the workplace. As MacKinnon provocatively asserts; for men, sex is power. Sexuality, MacKinnon (1979) argues, is one of the major ways men continue to dominate and devalue women:

Women's sexuality is a major medium through which gender identity and gender status are socially expressed and experienced....A deprivation in employment worked through women's sexuality is a deprivation in employment because one is a woman, through one of the closest referents by which women are socially identified as such, by themselves and by men. Only women and...all women possess female sexuality, the focus, occasion, and vehicle for this form of employment deprivation (pp. 182-183).

Our legal system reflects a social power structure that normalizes male sexual dominance and female sexual availability. When it comes to sexual harassment, sex as power does not rely on sexual attraction. Sex is power in the demeaning treatment of lesbians for failing to conform to a masculine defined sexuality; sex is power in the abuse of men who

⁷For the purposes of this dissertation, I do not distinguish between the terms sex and gender. Gender is a social construction which includes within it the social construction of female sexuality.

do not conform to masculine standards of sexuality. Sex as power is often expressed in conjunction with a racist power dynamic; sex is power in the racist characterizations of women of color and ethnic stereotypes about sexuality.

Critics argue that in her theorizing about the relationship between sex and power, MacKinnon has and simply replaced a white female norm for a white male norm, and that by generalizing women's experience she has ignored the issue of race and the experiences of women of color. Angela Harris (1990) asserts that feminist scholars who attempt to articulate a "women's experience" end up claiming a monolithic experience based on middle class white women which systematically neglects other facets of experience like race, class, and sexual orientation:

MacKinnon is quick to insist that there is only one true unmodified feminism: That which analyzes women as *women*, not as subsets of some other group and not as gender-neutral beings. Despite its power, MacKinnon's dominance theory is flawed by its essentialism. MacKinnon assumes, as does the dominant culture, that there is an essential women beneath the realities of differences between women - that in describing the experiences of women issues of race, class and sexual orientation can therefore be safely ignored or relegated to footnotes (p 591-592).

Harris argues against abstraction in feminist legal theory: "contemporary legal theory needs less abstraction and not simply a different sort of abstraction. To be fully subversive, the methodology of feminist legal theory should challenge not only law's content but its tendency to privilege the abstract and unitary voice, and this gender essentialism also fails to do" (id p. 585). Minnow (1988) also cautions of the dangers of essentialism. She stresses that we should be wary of invoking a new norm or a single perspective of truth, "...women fall into every category of race, religion, class, and ethnicity, and vary in sexual preference, handicapping conditions, and other sources of assigned difference. Any claim to speak from women's point of view, or to use women as

a reference point, threatens to obscure this multiplicity by representing a particular view as the view of al.”(p. 341).

Kimberle Crenshaw (1992) develops the term “intersectionality” in order to describe the ways in which race and gender are experienced by women of color. She states “The intersection of racism and sexism must be acknowledged and actively addressed if women of color are to be empowered to struggle against sexual abuse” (p.1472). Crenshaw notes that the experiences of black women are informed by their social situation and a history of discrimination:

Although the institution of slavery is now behind us, the stereotypes that justified sexual abuse of Black women are still very much a part of our current society. We see elements of this in the experiences of Black women who are abused in their jobs and in the experiences of Black women elsewhere. In sexual harassment cases involving African-American women, the abusive conduct directed toward them sometimes represented a merging of racist myths with their vulnerability as women...myths and stereotypes about Black women also influence whether the insult and injury we’ve experienced is thought to be relevant or important. Again, attitudes of jurors seem to reflect a common belief that Black women are different from white women and that sexually abusive behavior directed toward them is somehow less objectionable (p. 1469-1470).

While there can be no contesting the fact that power in American law and politics is informed by race and class as well as gender, an analysis based on gender need not make an essentialist argument or minimize the importance of race, class, sexual orientation or other identifying characteristics. Black women are abused and harassed as women; the experience of women of color and poor women cannot be described or understood without taking the power dynamic of sex into account.

MacKinnon (2002) asserts that she does not intend to claim a commonality of experience for all women. Her theory of dominance identifies a major component of the social and political dynamic that all women face. “Feminism does not claim that all

women are affected the same by male power or similarly situated under it - just that no woman is unaffected by it. Feminism does not see all women as the same; it criticizes this view. It does claim that all women are seen and treated as women in some way under male supremacy” (p. 73). MacKinnon’s characterization of women as victims within an entrenched system of patriarchy, is seen by some as perpetuating the dominant ideology. Harris (1990) cites bell hooks in her criticism of gender essentialism, “the notion that women’s commonality lies in their shared victimization by men directly reflects male supremacist thinking. Sexist ideology teaches women that to be female is to be a victim” (p. 613). I would argue that it is not sexist ideology, but life experience, which teaches women that to be female is to be a victim (or certainly a potential victim). Sexism and misogyny are ingrained in our culture, in our laws and in our politics. We are all of us, potential victims of sexual violence, sexual abuse and sexual harassment.

The critiques of essentialism articulate a valid concern that without a theory and course of action that specifically draws attention to the ways sexism is often shaded with racism. Women of color are likely to be left on the sidelines, invisible to the law and efforts to shift the current power structure. But we should not, as the saying goes, throw out the baby with the bath water. Dalton (1987) acknowledges the dangers of grand feminist theories. “...a feminist narrative or theory should not imagine itself as *replacing* (but only as *displacing*) a male or masculinist one...no single feminist narrative or theory should imagine that it can speak univocally for *all* women” (p. 34). However, she recognizes the power and the importance of focusing on women, even as we understand the term to be a cultural construction:

...the *women* whose lives are shaped by that construction, as it intersects with others, do indeed exist. They exist subordinated to men: poor, more than men;

physically and sexually abused, more than men; paid less than men; promoted less than men; employed and managing a home, more than men; raising the children, more than men; underperforming relative to their male peers, in academic and professional settings; exploited, denigrated and stereotyped in popular cultural imagery, more than men...(id. p. 36)

It is necessary to first identify the existing power structures before we can attempt to undermine them. Feminist legal scholarship has shown that we must use those tools of power that we can access. Law is the means through which we hope to attain greater inclusion and equality. Law requires the use of classifications and generalizations.

Without such, there would be no law, only a set of specific rules and regulations. The problem arises when the means of legal categorization overshadows the ends:

Law, like the language which is its medium, is a system of classification. To characterize similarities and differences among situations is a key step in legal judgements. This step, however, is not a mechanistic manipulation of essences...Law needs some theory of differentiation. Feminism, as a theory of differentiation, is particularly well suited to it. Feminism brings law back to its purpose - to decide the moral crux of the matter in real human situations...Feminist method stresses that the mechanisms of law - language, rules, and categories - are all merely means for an economy of thought and communication...But we must not let the means turn into an end (Scales, 1986 p. 46).

Classifications and questions of difference are part of the language of law.

Feminists adaptation of legal language creates an opportunity to challenge their meaning and to inform the hegemony that constitutes legal meaning. By establishing legal doctrines which define women's experience of discrimination, sexual harassment law has the potential to shift the power dynamic by acknowledging the harm of harassment and providing an opportunity for redress:

The existence of a law against sexual harassment has affected both the context of meaning within which social life is lived and the concrete delivery of rights through the legal system. The sexually harassed have been given a name for their suffering and an analysis that connects it with gender. They have been given a forum, legitimacy to speak, authority to make claims, and an avenue for possible

relief...The legal claim for sexual harassment made the events of sexual harassment illegitimate socially as well as legally for the first time (MacKinnon 1987 p. 103-104).

We must use the language of law while remaining conscious that the law is a means to an end - not an end in itself. The challenge is to recognize that what counts as discrimination and difference is always relational and that legal categories should delineate, rather than obscure, our ultimate goal, what Scales refers to as “the moral crux.”

Instead of trying continually to fit people into categories, and to enforce or deny rights on that basis, we can and do make decisions by immersing in particulars to renew commitments to a fair world...Substantive commitments [such as a workplace free of a hostile or intimidating environment] do not tell us what to do, but may help us select from plausible, competing choices in a given circumstance. Moving between specific context and general commitments, we can challenge unstated assumptions that might otherwise rule (Minnow, 1987 p. 91).

Harris (1990) asserts, "Even a jurisprudence based on multiple consciousness must categorize...My suggestion is only that we make our categories explicitly tentative, relational, and unstable, and that to do so is all the more important in a discipline like law, where abstraction and 'frozen' categories are the norm" (p. 586).

Grand theories ought not to be what feminism is about. Feminist theory must embrace the intersectionality that make up women's lives and acknowledge the differences among women, while also recognizing that women are devalued because of gender and abused and objectified because of their sex. According to Scales (1993) “Feminism does not claim to be objective, because objectivity is the basis for inequality. Feminism is not abstract, because abstraction when institutionalized shields the status quo from critique. Feminism is results oriented” (p. 45). By looking at the particular, specific social contexts and experiences of women, without losing sight of the overall structure of

patriarchy and sexism inherent in law's hegemony, a feminist analysis can uncover ways that attitudes about sex and gender intersect with other aspects of identity and social institutions to inform understandings of law and legality.

The individual level analysis of this project is particularly appropriate for addressing questions about the intersectionality of women's experience. Recognizing that each instance of sexual harassment occurs in a social context which may implicate issues of race and class as well as workplace power dynamics, allows for the inclusion of multiple perspectives without reinforcing the idea that legal categories are permanent representations of reality, or minimizing the importance of gender. My project focuses on individual women to explore how the social structures of gender, sexuality and patriarchy are implicated in their conceptions of legality and their efforts to mobilize the law against sexual harassment.

This study examines the relationship between law and social attitudes along with the concomitant question of the ability to create social change through law. Chamallas (1993) notes:

Sexual harassment law is of particular interest to feminist theorists confronting the capacity of law to promote cultural change...the change in the law has done more than simply create new legal rights. This feminist intervention into the law has affected the cultural meaning of interactions between men and women in the workplace, even when new meanings have not translated into legal victories (p 37).

Given a society which continues to devalue women and legal institutions which have been resistant to acknowledging women as complete beings, the questions remains, whether law, which has historically been implicit in women's subordination, can ever be used effectively by women as a tool of change:

Sexual harassment, the legal claim, is a demand that state authority stand behind women's refusal of sexual access in certain situations... The problem is, the state has never in fact protected women's dignity or bodily integrity. It just says it does [sexual harassment law] is part of a larger political struggle to value women more than the male pleasure of using us is valued. Ultimately, though, the question of whether the use of the state for women helps or hurts us can only be answered in practice, because so little real protection of the laws has ever been delivered (MacKinnon, 1987 p 104-105).

By examining the experiences of women who turn to the law in response to sexual harassment, my work inquires into the extent to which law as a system of knowledge can re-articulate our understanding of social categories and relationships. To what extent does the existence of a law against sexual harassment actually help women? In what ways does their decision to mobilize the law create social change or inform attitudes about women and sexual harassment? How do these women who appeal to the law, perceive the law as an agent of change? Does the law provide an avenue to alter the terms of power or change the social dynamic of gender in the workplace? Focusing on the perspective of those who would challenge the existing power dynamic offers an opportunity to address these questions and to gain a greater understanding of the ways individual experiences of sexual harassment and discrimination inform understanding and attitudes about law.

CHAPTER 3: WHY DIDN'T SHE DO SOMETHING?

The title of this chapter refers to the continual refrain heard from politicians and talking heads in the media during the Thomas confirmation hearings asking, “Why didn’t she just quit?” or “Why didn’t she file a complaint?” A review of sexual harassment case law has shown how the legal system perpetuates the status quo and disregards or diminishes the experiences of women who are sexually harassed. In appealing to the law of sexual harassment, women are forced to use a tool that was designed by men for men, and which doesn’t take into account the life experiences of the majority of women. Despite the existence of sexual harassment law, gender based assumptions about the role of women and women’s sexuality pervade our social, legal and political institutions and encourage a view of women as sexual objects.

The question, “Why didn’t she do something?” reflects a lack of understanding of the impact of sexual abuse and the historical role that economics and power continue to play in the victimization of women. A close look at the experience of women who have been victims of harassment and the context in which harassment occurs provides a point of reference from which to address the question in the title. Given that the vast majority of women who have been harassed never file a formal complaint, a better question to ask is - what prevents women from engaging the law against sexual harassment on their own behalf?

In this chapter I will examine the experiences of my respondents and the concerns they express about filing a formal complaint, using the framework developed by Felstiner, Abel and Sarat (1980) to explain how disputes are transformed into legal claims. They identify three stages of the transformation of a problem or injury into a legal

dispute, which they term “naming, blaming and claiming.” The first stage is naming, that is identifying an injury as a legal wrong. The second stage in the transformation is blaming; at this point the injured person must feel that some other entity (individual or organization) is to blame for the wrong they have suffered. The final stage of the transformation process is claiming, the point at which an individual files a grievance in an effort to seek redress for the injury.

Felstiner et al. recognize that ... “only a small fraction of injurious experiences ever mature into disputes...Furthermore, we know that most of the attrition occurs at the early stages: experiences are not perceived as injurious; perceptions do not ripen into grievances; grievances are voiced to intimates but not to the person deemed responsible” (p. 636). Research confirms that this is certainly the case with sexual harassment – studies have shown that less than one fifth of the victims of harassment file any type of formal complaint. In this instance, studying the process before injuries are translated into legal claims is critical to understanding women’s experience of the legal process. The framework developed by Felstiner et al. emphasizes that legal disputes are social constructs, and as such, studying the mechanism and institutions for resolution of disputes (i.e: the courts) is extremely limited. Their approach focuses on the individual as a legal actor and transformation as a social process. “It means studying the conditions under which injuries are perceived or go unnoticed and how people respond to the experience of injustice and conflict” (p 632). This framework is particularly well suited to my data which reflect the experiences and perceptions of my respondents as they decide how to respond.

An examination of the transformation process in the context of sexual harassment,

with attention to the factors which inhibit naming, blaming and claiming, provides ample evidence of the many obstacles women face when they attempt to transform the harm of harassment into a legal complaint. The experiences of my respondents serve to highlight the various obstacles women confront at each step of the “naming, blaming, claiming” process and illustrate the many ways that the legal system and sexual harassment policies serve to discourage women from filing complaints against harassment. From identifying the harm, to placing the blame, to navigating the process of filing a complaint or lawsuit, there are many reasons why women experiencing harassment may stumble at each of these stages.

Data gathered from my interviews support the argument that social attitudes about sex and gender along with the power dynamic of the workplace discourage women from filing complaints in response to sexual harassment. These interviews with a small number of women who have taken the unusual step of challenging sexual harassment by mobilizing the law on their own behalf, indicate that women make thoughtful, informed decisions about the power of the law and the consequences of using that power. They are aware of the difficulties and possible repercussions of using the law to address their situation and recognize the law as a tool of last resort. A crucial element of this project is the importance of individual level data and its capacity for looking at women as whole persons, rather than simply a category of analysis.

The Voices of the Victims

Most of the women I interviewed seemed eager to tell their stories. Often the interviews began with respondents giving a recitation of the facts, as they had already

done numerous times before with lawyers and agency representatives. As the interview progressed and I asked them to elaborate on their experience, feelings and motivations, they would often open up and relax, as if relieved and pleased to have a sympathetic listener. They all spoke about very private, difficult feelings, a few mentioned past histories of mental illness, rape or sexual abuse - wounds that were re-opened as a result of the harassment. The respondents represent a variety of backgrounds, professional and educational experiences.

S is black, age 25-34 and a single mother with young children. She had returned to school after being fired from her job as a police officer in a large metropolitan city, and was attending college at the time of the interview. She describes harassment which began at the police academy in 1993 and continued with her superior officer. She describes a workplace in which harassment was frequent and commonly accepted as part of the culture. She initially tried to respond through formal channels and found that the formal complaint procedure in her district would have required her to complain to the very person who was harassing her. After three years, she filed a complaint with the city Division of Human Rights. Immediately after filing a complaint she suffered severe retaliation which inhibited her ability to function on the job. Ultimately she was fired. At the time of the interview she had found a part time job and the complaint was being investigated by the Division of Human Rights, but S had been unable to hire an attorney to follow up on the case.

B is a young, white woman, age 25-34, who recently graduated from college. She was raised in an upper middle class New Jersey town. At the time of the interview she was engaged. Upon graduating from college in 1995, she got a job at a small privately

owned business which was owned by an older man and run by his daughter. The owner of the company often engaged in inappropriate touching of the employees and open discussion of his sex life, which B observed soon after she started working there.

Although this behavior was commonplace, the other workers were afraid to file any type of complaint. She described a workplace populated by young, uneducated women, many of whom were undocumented immigrants. When the harassment was directed at her, she brought it up with the daughter, who shrugged it off. Shortly after her complaint to the daughter, B found her position was “discontinued” and she was let go. As a result of being fired, she was able to get unemployment insurance. Through a colleague of her father’s B engaged a private attorney and filed a claim of sexual harassment in 1996. At the time of the interview she had been through the discovery process and a court date had been scheduled, cancelled and rescheduled. B complained that the ongoing litigation was interfering with her wedding plans and impeding her ability to get on with her life.

P is a married, white woman aged 45-54, with teenaged children at home. She has some college education and her husband’s income placed her in a comfortable middle class economic status. In 1994 she got a job in a privately owned publishing company. She describes a male dominated workplace and hostile environment in which there were a lot of crude sexualized remarks about women. When she complained to the president the company she was insulted by him. At the time she was not aware of any grievance procedure or EEO policies available at the workplace. Because of her husband’s income she was able to quit her job after less than a year. She initially went through the EEOC who found in her favor in 1995. After that she retained a lawyer and her case was settled 1997. Although the settlement agreement states that she is not supposed to discuss the

case, she agreed to speak with me because she felt it was inappropriate that everything remain confidential and there is no public record of the offense.

C is white, divorced, age 45-54, and lives in a working class neighborhood. She works in an administrative position for the department of corrections. She was targeted by a prison guard for rude and sexualized comments. At one point he came into her office and groped her breast. She says she would probably not have filed a formal complaint but for the fact that her supervisor heard her yell and alerted the EEO office. After that, C either had to deny that anything happened or file a complaint. After an internal investigation found in her favor, the offender was transferred to another location. She suffered retaliation by the other guards and extreme anxiety and psychological distress. Despite the retaliation she continues to work for the same department, unwilling to give up the benefits and job security of her position. She later filed a complaint with the EEOC, and the investigation was still in progress at the time of my last interview with her.

V is a single, black woman, age 35-44, with no kids and some college education. She has been working as a carpenter for 11 years. As a union carpenter she is the highest paid woman I interviewed, the only one of my respondents with a personal income between \$50-\$75,000. V has a strong personality and an emphatic sense of equal rights which has served her well in the male dominated profession of skilled labor. She has worked hard to be taken seriously by her peers and has ignored minor infractions such as sexual comments over the years. When a co-worker cornered her, touched her inappropriately and tried to kiss her in the fall of 1998 she felt a major boundary had been crossed. She filed a complaint with the supervisor on the job site and with the union. She

was frustrated by the inaction of the union and felt her complaint fell on deaf ears, so she went on to file a complaint with the EEOC, which issued a right to sue letter. V spoke to a number of lawyers who offered her advice, but none would agree to represent her. Undaunted, she has filed her case pro se (without counsel). At the time of the interview in October 2000, she had turned down settlement offers that she deemed insignificant and was awaiting a court date. She continues to work as a carpenter.

R is a young, black single mother, age 25-34, with young children. She has a college degree and worked as an administrative assistant for a large city agency. She reports that the harassment began as soon as she started her job in April 1998. Her boss began touching her in a sexual way. She believes that he hired her with the intention that she be sexually available to him. The workplace environment she describes is rife with sexual abuse and harassment. She was hesitant to file an internal complaint because it was common knowledge within the agency that such an action would result in being fired. When she went to the EEOC for information she was told that in order to pursue a legal claim she should first go through her employer's internal procedures. She was fired immediately after filing a complaint with the EEO office of her employer. She was able to find another full time job as a high school teacher and found a lawyer willing to take her case. At the time of the interview in October 2000, the case was awaiting a trial date.

W is white, age 45-54, and divorced with grown children. She is the only one of my respondents with a professional degree, and works as an architect for a city department. She describes a hostile work environment with a very anti-female attitude. She was discriminated against beginning in 1995 because of her gender and her age, and also reports talking to others who were discriminated against on the basis of race. She

was subjected to hostile comments and discriminatory treatment from the assistant deputy director of her department. When that individual was promoted to deputy director and then director, the harassment became more intense. W filed a complaint with the internal EEO office and was demoted as a result. An investigation by the EEOC in 1998 found in her favor, but she did not regain her previous employment status. After the EEOC investigation she hired a lawyer and filed a claim. At the time of the interview the case was pending.

L is latina and single, age 18-24. She has some college education, but no degree. She was working for temp agency at the time of the harassment and was assigned as a receptionist for a private firm. Almost as soon as she reported to work the owner of the firm began propositioning her. He would corner her in workplace and engage in inappropriate conversation, insisting that she go out with him and asking about her boyfriend. She continued to work at the same location for three months, after that time she complained to the temp agency about the harassment. The agency acknowledged that this individual was known to have harassed other young women and L was reassigned to a different employer. When she went to the EEOC for information about pursuing a complaint, she was told she had no legal standing to file a legal claim because she was not harassed by her employer, the temp agency, but rather by an individual at the company that contracted her employer.

JB is an older black woman, age 55-64. She is a widow with grown children and some college education. She worked as a bus driver in a large city for 30 years in what she describes as an extremely hostile environment. The depot where she worked employed primarily black men. However all the management and supervisory positions

were held by white men. As one of the few women bus operators, she was subject to hostile behavior and sexual innuendo. However, after her husband passed away the nature of the harassment escalated to include physical abuse. She reports that during 1989 and 1990 she was repeatedly ordered by supervisors to undergo a “medical examination” which consisted of her going into a closed room and having her breasts “examined” by the men present. When she finally refused to go along with the order to undress for one of these so called examinations, she was summarily fired. She was reinstated on the condition that she withdraw her complaint. She provided me with a document at our interview which read:

[JB] is hereby requesting withdrawal of my official employment discrimination complaint filed on January 18, 1991. My withdrawal is not a result of coercion or intimidation. I understand this withdrawal will conclude the investigation of my complaint with respect to my own situation by the [employer].

After she was reinstated, she continued to be subject to intimidating and abusive behavior. Her superintendent would proposition her, send her suggestive letters and call her at home. The supervisors began showing up at her home, entering her house and harassing her by exposing themselves and trying to grope or kiss her. When she filed another complaint she was targeted for retribution designed to undermine her position at work. She hired an attorney to represent her at an EEOC hearing, but the case was dismissed. She continued to refuse her boss’ sexual attention and she was repeatedly suspended and ultimately fired. She filed a complaint with a state commission on human rights. At the time of the interview she was unemployed, unable to receive her pension and was waiting to hear the status of her complaint.

JJ is a middle aged, 45-54, black woman, divorced with a school age child at home. She works in the post office of a large federal financial institution, where she has

been employed since 1978. Although her department was primarily men, she said she had no problems working with the men on the night shift. However, she felt she was a victim of discrimination based on a combination of age, race and sex. She was continually passed over for promotions and younger, white men, whom she trained, would be promoted above her. She first complained in 1983 after a young, white woman with much less experience was given the promotion to the day shift that she had requested. After her complaint, she was given the day shift job where she was subjected to verbal abuse and sexual intimidation. She was also singled out for disciplinary action and felt that the supervisors were trying to undermine her work performance and establish a negative record in order to dismiss her. In 1987 she filed a complaint with the internal EEO office, which was dismissed after two years. Finally, in 1993 she filed with the state office of the EEOC. At the time of the interview, she continues to work at the same place and the case with the EEOC is pending.

A is white woman age 45-54, with a college age daughter. She is divorced and has a high school degree. She worked as a billing coordinator in a doctor's office. The harassment began shortly after she started working there, one of the doctors would make sexually suggestive remarks and engage in inappropriate touching. At one point he kissed her in the office. In addition, a female office manager created a very difficult working environment by not allowing A access to the information she needed and assigning her work that was not part of her job description. After six months she quit the job. Shortly after she left the doctor's were indicted for insurance fraud. In 1994 she filed a complaint with the EEOC and in 1998 she received a right to sue letter. However, she has been unable to find an attorney to proceed with the case.

D describes herself as white and Latina. She is aged 45-54, divorced with older children. She has a college degree and worked as an administrator at a state college. For two years she was harassed by a professor, a department Chair, who sent her intimate letters, photos and lingerie. He also left his underwear in her mailbox in the college office and sent a sexually explicit letter to her teenaged daughter. The professor created a fictional history for them and bragged to the faculty and staff about their relationship. D called the wife of the harasser and the president of the college, both of whom refuted her allegations and suggested that she created the problem by getting involved in the relationship. She followed the harassment complaint procedures of the college, meeting with the sexual harassment committee, but nothing was done. Eventually, she quit her job and filed a complaint with the EEOC, which issued her a right to sue letter, but she has been unable to pursue the case because she cannot afford an attorney.

What all these women have in common is that they all suffered the indignity and worse of sexual harassment on the job and were penalized when they tried to fight their employer or harasser by going through “appropriate channels” in order to have their injury acknowledged and to obtain some form of remediation or recompense through enforcement of existing laws against sexual harassment employment discrimination.

Naming Sexual Harassment

Felstiner, Abel and Sarat (1980) identify three steps in the process of transforming an injury into a grievance which they term “naming, blaming and claiming.” The first step in transforming a dispute or harm into a legal claim is naming the injury. Ann Scales (1993) articulates what she calls “the power of naming,” that is, giving

women the power to identify and articulate their own injuries and experiences. "Naming is a critical concept to feminism....Naming means rejecting the Adam myth that the world was made for males to discern; it means reclaiming our own world and our own experiences" (p. 55, note 17). However, the power of naming seems unequal to the task of disrupting the male dominated social norms by which women are judged. Despite increased awareness of the issue of sexual harassment and a growing body of case law, many women never identify their experience as harassment.

The comment, "why didn't she complain?" reflects the similarities between sexual harassment and other forms of sexual abuse in the assumptions about women's responsibility and complicity in their own victimization. Sexual harassment is a form of sexual abuse and occurs on a continuum from rude comments and suggestive remarks to unwanted touching to rape. It must be understood within the context of a culture of sexual intimidation, objectification and violence against women. As in the case with rape, the ability of women to articulate a complaint about sexual harassment is hampered by social attitudes which suggest that women, are in fact, willing participants in their own harassment and abuse.

Women in the United States have been socialized to understand that we are always at risk; every woman is a potential victim of sexual violence. We have so internalized this threat that we think it only common sense to avoid walking alone at night, keep our doors locked, and the many other defensive mechanisms we engage in daily to try to avoid assault. "In our rape-prone culture, girls and women are socialized to expect violence in their everyday lives, resulting in such violence becoming normalized" (Love & Mariman, 2003 p. 94).

Among my respondents the harassment ranged from hostile environment to gender based harassment, rude and suggestive comments, sexually explicit language to physical assault. In all cases, fear of sexual violence coupled with the power of the perpetrator, created high levels of anxiety and psychological trauma. Nevertheless, they did not automatically identify the behavior as sexual harassment. One respondent quit her job because of the constant rude, sexualized, anti-female jokes and remarks but did not identify it as harassment until she saw a news report on sexual harassment. P says, “I didn't think of it at the time as sexual harassment, but was upset about the behavior and wanted to lodge a complaint somewhere. Years after I left, I saw a piece on the news about sexual harassment and learned that the first step in filing a formal complaint was going to the EEOC.”

A worked for doctor's office. One of the doctors propositioned her, made suggestive comments about her body and finally kissed her. When asked if she identified this behavior as sexual harassment she said, “I thought it was, but who knows what the world thinks...[at the Civil Rights Division] I got my log out. I was reading to her. She only put down what she thought was harassment. I said I don't know what constitutes harassment, sexual harassment, so I basically sat down and told her everything.”

As with other forms of sexual abuse, the initial response is often denial. R reports:

My original response was that I didn't really believe it was happening...But when there is a job involved, when there is money involved, when there are so many issues involved where you have to support yourself and a family; you try to first talk yourself out of it, try and act like it is not happening. Because with that, once you realize that it is happening... the entirety and the gravity of the situation, there is so much pain that goes with it...Emotional pain, physical pain, a lot of fear and loss of a job, loss of financial independence.

The preponderance of women portrayed as sexual objects and men as sexual aggressors in mainstream media and entertainment encourages the attitudes and behaviors which lead to harassment and gives women cause to fear sexual violence. B, a recent college graduate, was employed in a medium sized company where the owner would regularly describe in detail his sexual activity and would ask women in the workplace to describe their sexual activity with lovers and boyfriends. “As soon as I got there I noticed that the man was hugging a lot of people and giving back massages... he talks about how he used to cruise late at night for hookers in Atlantic City... He comes up to me in the hallway and gets right in my ear, and he said ‘your outfit is very alluring.’” While graphic, intimate sex talk in the workplace may seem uncomfortable and inappropriate, in a workplace environment where sexual language and innuendo are inescapable, and in the context of a world where sexual victimization and violence against women are commonplace, acts that might, from a male perspective seem merely rude or annoying, can create a sense of anxiety and fear of victimization. B continues:

Then one night I had to stay late, there was just him and me and his daughter. I was in a conference room, and he came in and was telling me about the massage parlor he goes to and getting a full body massage...I tried to cut him off, but he kept going on and on. I was very nervous, it was dark out at this point and I am the only one there. So I finished my work and I quickly left.

A young woman, alone at night, may reasonably fear an employer who brings his sexual fantasies to work and describes them to his employees, and wonder about such an employer - what might he be capable of, what might he do next? But it did not end there, B reports, “Then the final one for me was I was in the hallway alone, and he came up behind me and kissed me on the neck. I just walked away and went in the bathroom to compose myself. It was so shocking, I mean like, I couldn’t even imagine...I was only

there six month and it was horrible. I still have nightmares about it.”

The psychological response to harassment as a fear of sexual victimization and abuse is particular to the experience of women. Yet, despite the existence of sexual harassment laws and policies, many women do not identify their experience as harassment because our society does not acknowledge the harms done to women everyday as we live with the constant threat of sexual abuse. Anna- Marie Marshall (2003) suggests that the frames women use to understand their experience influences whether or not they term it as harassment:

Feeling a sense of harm does not automatically translate into the use of the label sexual harassment. Rather women also employed an objective standard that compared their experience to some threshold of harassing behaviors. Only when the behaviors met this standard of offensiveness and were perceived as harmful did women consider their experiences sexual harassment” (p. 659).

The reactions and behavior of those who are responsible for implementing sexual harassment policies often reinforce hostile environment as the norm. This normalization of sexual degradation creates a very high threshold and discourages women from identifying their experience as sexual harassment. C works in an environment where “hyper-masculine” behavior is the norm. She spoke about a prison guard whose behavior escalated from sexualized hostile environment to verbal abuse to physical abuse:

So F would bring the inmates, leave them to work on the grounds and come up and hang out with [another guard]. They talked about guns and beating people up...then F would walk out and stand a little way away and masturbate. And he said, ‘when is it going to be my turn’? He would answer the phone and say ‘when is it going to be my turn.’ I couldn’t see him without him saying stuff like that. And he would come in, he never had a reason to come in my office, never, never. But he would come in... I am sitting here at my desk as he comes into the office and he put his hand out like ‘no hard feelings’ and that is when he grabbed me. He grabbed [my breast] really hard and it hurt. And I screamed and said get out of here, leave me alone!

Such abusive behavior is rarely an isolated incident or targeted at one individual, rather it generally represents a pattern of behavior. Nevertheless, employers may ignore harassing behavior even when a clear pattern is evident. After an internal investigation C discovered that the individual in question had a history of harassing behavior. At least one other woman had complained about the same guard six years ago:

She was afraid to go in the basement because he had followed her down into the basement...The union representative, our local union president used to tell us he would feel her up, push her up against the file cabinets...They did send him off the grounds the next day, but that's what they've been doing with him for years, just moving him around...He shouldn't have been there in the first place, with this history, to even do this. He shouldn't have been allowed there. I think they are wrong for that. With his history, he shouldn't have even been there... I want him to be put somewhere, like on a highway detail where he won't be near women.

Sexual harassment law was intended to address the devastating experience of discrimination and harassment of a sexual nature. However, since laws are a reflection of the attitudes and beliefs that saturate our social and cultural understanding, harassment often occurs in an environment where it is ignored or condoned. JJ reports, "I even had a male come in the corner and unzip his pants and show himself. Like he was discreet, so there wasn't nobody out there in the hall, and when he called me and I looked back, he had his self out in his hand. I went to the supervisor and told him about it, they all laughed about it. It was a joke with them."

S indicated that the harassment began while she was in the police academy. "It started because I refused to go out with one of the instructors. Then from there it was sort of like he disliked me and he was always after me after that. He would pretty much fail me and give me bad evaluations... I tried to speak to the supervisors at the academy about

the situation, well, of course it was a thing that I was lying because I was new.” Once she became an officer, many of her shifts began with the Sargent describing in graphic detail, for the entire precinct (during disposition of assignments), fictional sex acts that would take place between her and her partner. “My platoon commander...would give out assignments, and while he did this he would talk about how he thought the guy I was working with would have missionary and doggie style sex in the car. He would talk about how he thought I would perform fellatio and he was really descriptive of some of the positions of the sex...This is what he did nightly.”

This experience was more than just uncomfortable and embarrassing, each time her superior officer humiliated her for the entertainment of the precinct, it had the effect of identifying her as a sexual object rather than a fellow officer and normalizing the abusive behavior. The rigid power hierarchy in the police department reinforced the attitudes and behavior that reduced her to a sex object and undermined her ability to be taken seriously by her colleagues. Any attempt to address the problem was ignored by higher officials. “It got to the point where my partner I was working with approached him and tried to get him to stop. That went nowhere. I did the same thing. Then I wrote letters to the chief of patrol’s office. That went nowhere.”

Felstiner et al assert that naming is the first critical step in the transformation process. Before disputes can be addressed and action can be taken in response, one must be aware of an injury with the potential for a grievance. Although feminists have given a name to the harm women endure when treated as sexual object in the workplace, and the law has recognized sexual harassment as a form of discrimination actionable under the Civil Rights Act, in a workplace where hostile sexualized language and behavior are the

norm and supervisors routinely ignore and dismiss women's concerns and complaints, many women are discouraged from identifying their experience as harassment.

Blaming the Victim

The next stage in the transformation process is blaming. At this stage one must recognize that another individual or organization is responsible for the harm. According to the framework developed by Felstiner et al, it is critical for an individual to determine that someone is at fault in order to move onto the next stage of filing a grievance in search of redress. "Attribution theory... asserts that the causes a person assigns for an injurious experience will be important determinants of the action he or she takes in response to it...people who blame themselves for an experience are less likely to see it as injurious, or, having so perceived it, to voice a grievance about it; they are more likely to do both if blame can be placed upon another" (p. 641). In the situation of sexual harassment, as with other forms of sexual abuse, victims often experience guilt, shame and self blame, which is reinforced by the social and legal norms that place the burden of proof on the woman to show that she did not encourage or invite the harassing behavior.

Although women may identify the behavior as harassment they often internalize the idea that they somehow brought it on themselves. According to R, "You always feel it was your fault. It is always some sort of blame and self doubt. Like it was all because of the way I look or that I incited him to doing this, maybe my bust was too big, maybe they should have been smaller, maybe I should have hid them better or minimize them." JJ was distraught by the verbal abuse targeted at her and tried to understand why her colleagues and supervisors would address her with such degrading and insulting

language, “So I said maybe I am doing something. I read about how they say sometimes it is what you project out there, that is what you will receive. So sometimes I get to feeling that maybe I make people talk to me that way...I hate telling people [about the harassment] because it will be humiliating to me. I feel like, what is it that is making them talk to me like that? So really I sometimes think maybe it is my fault”.

How individuals perceive and understand an experience is often influenced by interactions with, and judgments of others. Felstiner et al point out that attributions are not fixed, but can be altered by new information, insight or experiences. The initial response by the majority of women who are harassed is to ignore the harassment or avoid the harasser, rather than filing a complaint, and reactions from co-workers and supervisors often convey the idea that they are the ones at fault in the situation. L, a young woman who was new to the workforce, was uncertain about office etiquette and the guidelines of appropriate behavior. She was unsure how to respond to the advances of her supervisor. “I was blamed for dressing provocatively and accused of leading him on,” she says. It was only after she rejected his advances and the behavior became hostile that she decided to say something about it. She felt that the temp agency she worked for did not take her complaint seriously, “they were more interested in keeping the account than what happened to me...They called me a trouble maker.” Although they did reassign her to another job, she says, “It was like I was being punished for what he did.”

D was harassed by a college professor who was also a department chair. The harasser put the word out that they were involved in a mutual relationship, an assertion which was accepted by most of the college faculty. D says, “People will look at me and say you dropped your drawers or whatever... [the attorney for the college] made the

comment to me, ‘you have some choice in men.’” Despite her assertions to the contrary and her efforts to inform the college administration of the actions of the professor, which included “things like leave his dirty underwear in my public mailbox at the college faculty room [and] over 300 written correspondences referring to my vagina,” people were more inclined to believe that it was a relationship gone bad, than to challenge the veracity of a tenured faculty member.

When a woman does try to get her employer to acknowledge the problem, the response from the supervisor often reinforces the idea that the problem lies with the victim, or that it is a personal problem rather than the responsibility of the employer. According to S, “And when I eventually did start writing letter to the EEO office, they denied everything and tried to say most of the allegations were groundless and that I was paranoid. That it was pretty much me and no one else was bothered by it.” JJ reports that any response to harassment on her part would result in punitive action:

I can remember they [co-workers] were calling me names like cow, called me a dog, stuff like that. And if I go complain to the supervisor, he would say I was exaggerating. I always got the write up for a complaint that I made and it got me to the point, when I would try to argue back, I also get wrote up if I argued back. So it was bad like that... I don’t care how I complained, it would always come back and be on me.

Sexual harassment is often combined with other forms of discrimination such as gender discrimination, sexual orientation and racial discrimination. Current social psychological research emphasizes the profound emotional and psychological impact of sexual harassment. Women who have endured sexual harassment suffer many of the symptoms associated with other forms of sexual abuse, including guilt, shame, decreased self esteem, depression, fear and anxiety, as well as physical illness.

The consequences of being sexually harassed devastates one’s physical well

being, emotional health, and vocational development...In addition, women have reported emotional and physical reactions to being harassed including depression, insomnia, headaches, helplessness, and decreased motivation. Sexual harassment in the workplace frequently occurs in a social context in which women experience physical hardship, loss of income, administrative neglect, and isolation (Paludi and Brickman, 1991 p. 27).

My respondents report extreme psychological distress which often manifested itself physically. B says, "I had nightmares at night, I would come home crying, it was making my physically ill." S reports, " It got to the point where I was physically getting sick, because it was stressing me out. I developed stomach ulcers, colitis, it was ridiculous. I was going to a therapist. I couldn't take it, it was driving me crazy." W states, "I got to the point where I was physically ill...he was almost disabling me...it was getting more and more obvious to me that I was getting sicker, physically and emotionally. It was extremely taxing. I was having nightmares."

The realization that you have been targeted as an object of sexual infatuation or obsession, coupled with the knowledge that the harasser has a certain amount of power and authority over you, often creates an escalating sense of fear and anxiety. R, a receptionist in a large city agency, offers a vivid description of her reaction to the continued sexual groping by her supervisor:

I mean I can't describe it to you any other way but to say it would be easier just to be raped, brutally raped. It doesn't even matter how or when, because you are just walking and are knocked in the head and dragged into an alley and brutally raped. That is still kinder because number one, you didn't know it was going to happen, it was unexpected, and it was something that happened indiscriminately so to speak. But when you are going to a job that you need every day and you have to prepare for that type of rape, the terror that you feel, it never leaves you, 24 hours a day, seven days a week. It doesn't go away over the weekend because you know you have to go back. You know exactly what this person's modus operandi is, you know you'll be subjected to sexual abuse. You know you will be stripped as a human being. You know this is going to happen and then you have to stand there while it actually happens. And then after it happens, you have to wait until it happens again. So you are always in a state of this constantly happening, and

there is no way to prepare for it, there is always the constant pressure and strain of knowing it is going to happen.

The profound emotional and physical toll of sexual harassment often has a significant detrimental impact on the ability of an individual to perform satisfactorily in the workplace. JJ describes how the stress of harassment interfered with her ability to function at work and caused physical problems:

I feel like when I am on the job, I have to work in such a tense environment, it could be like when you are walking through a mine field and you have to be careful everywhere you step. That is how I feel when I am working, every little thing I do I have to be extra extra careful, because that is how they are watching me... I have a file about two or three inches thick almost. That is how thick my file is in medical division, for all the harassment, I end up getting sick. And then I have to go to the doctor, they take me out for a month or two months. Then I get well and I go back. I'm all right for a while, then all the harassment will start again.

V has been a union carpenter for eleven years. As black woman in a male dominated profession, she must constantly prove herself on the job. She has built a solid reputation for herself as a skilled laborer and a hard worker. Over the years V. has heard her share of off color jokes and fended off sexual advances and has developed a system of coping. She let's them know right away that she isn't interested in their advances and keeps her distance from those who don't seem take no for an answer. She describes the impact of an incident in which a co-worker refused to get the message and tried to kiss her on the job site, "But in any case, the next day as I was coming in, I was just really upset over what happened, upset that he just wouldn't hear my no. I don't like people touching me unless I say so...I take it very seriously. So as I was coming to work that next day, by the time I got to work, to the job site, I was in a heap of tears." In this instance the harassment affected her ability to function effectively at work. It shattered the safe space she had created for herself in her occupation and undermined her ability to

continue her previous standard of work:

I want to mention, it affected the jobs I was on after. It affected my performance. I was very upset about it. Every job you go from company to company, different jobs, and you have to prove yourself every time. And there was one particular company I happened to work with for the very first time, it was a fairly big company in the industry. And I didn't perform my best. I didn't have clarity of thought and ease of movement. I wasn't able to complete my tasks as I normally would have. One time I almost fell off a ladder because I didn't sleep the night before; I was thinking about that incident. It was a distraction that affected me, my work performance, that I was upset about. I have a good performance record... But this one particular company, I know I didn't perform my best. And had I been able to perform my best, I might have been able to be a company person for them. They may have wanted to keep me with them. But I know I didn't do my best and I didn't complete the tasks well in a decent amount of time.... I was very unhappy about that.

For some, it is the financial hardship of losing a job and benefits, or the threat of losing a job that allows women to see harassment as a harm done by the employer. P says that although she decided to quit rather than continue to work in such a hostile environment, it was a while before she came to the conclusion that the employer was responsible. "It was only after I quit, and was between jobs that I began thinking - I shouldn't have had to leave that job. At that point I decided that they owed me something."

B, who was fired after she complained about the harassment, said she didn't think of it as a legal issue or consider the behavior to be harassment initially. It was only after she spoke with a family friend who was a lawyer that she thought about a legal remedy:

I didn't really think of it as sexual harassment until I got fired...I thought it was disgusting, I thought they were horrible and hateful people... It is weird that you think it would be common sense that I just got fired for complaining about sexual harassment; but I didn't until a lawyer pointed it out. He said you have a case...The only thing I really knew about sexual harassment was the Anita Hill case. I thought of it more along the lines, which is why I didn't think of it pertaining to me, was more graphic. Like men at work soliciting you to do sexual acts for them in order for you to get ahead. That is what I was thinking it was...I didn't really internalize being fired for complaining as it, until someone pointed it

out. Then it was like duh. Of course that is.

When considered in the context of a culture rife with sexual violence against women, and an economic and social context in which women have limited power, the experiences of women who have been harassed and their responses to the harassment helps to explain why so few women get past the naming and blaming stage in order to challenge the power structure by complaining or filing a grievance.

Claiming: Law as the Last Resort

At the final stage, claiming, one looks to have the wrong redressed.

Transformation of an injury into a grievance requires the individual to acknowledge the injury, attribute blame and assert the desire for a remedy. This process is contingent on an individual's perception of their own experience as well as social structural variables and interaction with others. Felstiner et al assert that "...individuals define and redefine their perceptions of experience and the nature of their grievances in response to the communications, behavior, and expectations of a range of people, including opponents, agents, authority figures, companions and intimates" (p. 638).

In deciding to file grievance or claim, one must believe that something will be done in response. The grievance is an attempt to see a remedy or redress for the injury. However, the institutions and authority figures that victims of harassment encounter often tend to reinforce the idea that filing a complaint will not result in a remedy. When the injury involves sexual harassment many women express doubt and concern about the legitimacy and effectiveness of complaint process. Research has shown that women are more likely to respond to harassment by ignoring or avoiding the harasser than by filing a

complaint. A 1994 survey of federal workers indicates that three quarters of victims of harassment were aware of anti-harassment policies, but only 6% reported filing a formal complaint. By far the most common responses were ignoring the behavior, asking the person to stop, and avoiding the person (USMPB 1994).

Consistent with these studies, my respondents would first try to diffuse the situation by avoiding the perpetrator and figuring out ways to minimize the interaction. B was caught between her aversion to her boss' behavior and the desire to maintain a professional attitude. She explains her reaction to her employer's inappropriate actions:

He would talk really explicitly about sex with some of the girls there, if they started talking about that, I would walk away. I never wanted to be involved with it...Whenever he tried to approach me and give a hug or back massage, I would stiffen up and just kind of give body language that I wasn't receptive to it...I was always trying to show him that I wasn't receptive to it. If he asked me personal questions, I would just give him short quick answers, I didn't want to get into it. But I was very polite, I didn't want to ruin my first job.

V says her initial response was not to file a complaint, but rather, like many women, she tried avoid or ignore the harasser, "I was just kind of hoping to get through it, if you will. I kind of estimated the job to be finished a little earlier than it ended up being finished. I thought I could just kind of deal with it and not have to take it any further, although that was putting unnecessary stress on me." She describes trying to avoid the colleague who was constantly propositioning her and making suggestive remarks:

And there were times when we had our coffee breaks together, and I would move on the other side because I didn't want to be next to him if I didn't have to. And sometimes when I get there early in the morning I would take the train and some of them would drive, and he would. He offered me to come in his car, it was kind of cold, but I wouldn't. I just stand up outside, I wouldn't get in his car.

JJ describes trying to ignore the abusive comments directed toward her, “I work with all males, and sometimes they are over here. Then the supervisor he starts calling me some names that I happen to overhear him refer to me, talking to some of the other guys, and he said that I was a bitch. I overheard it but I didn’t say anything to him. I just accepted it.”

In addition to having little confidence that a complaint would resolve the problem, many women feel that filing a complaint may actually make things worse. Gutek (1985) reports that many victims of harassment said they feared reprisal, that they would be blamed for the harassment, and that nothing would be done even if they did report it. Respondents in the federal study cited a number of reasons for not filing a complaint; 29% said it would make their work situation unpleasant, 17% said it would have an adverse affect on their career, 20% indicated they didn’t think anything would be done about it, and 9% felt they would be blamed for the harassment (UMSBP 1994). When asked if formal action made things better, worse, or made no difference, 47% indicated filing a grievance made things worse, 32% said it made things better and 21% said it made no difference.

The numbers are similarly discouraging when asked about filing a discrimination complaint or lawsuit. In this case only 21% said it made things better, 37% said it made things worse, and 42% said it made no difference (USMPB 1994). In a Navy study over 38% of enlisted women and 24% of officers responded that they did not file a formal complaint because “I did not think anything would be done” (Culbertson and Rosenfeld 1991).

Among my respondents, fear of retaliation and job loss were most often

mentioned as reasons for not filing a complaint.⁸ They spoke of situations in which harassment and abuse of power were institutionalized in the workplace and filing a complaint was more likely to cause greater harm than to resolve the problem. S, the police officer, describes the reluctance of her co-workers who had also been harassed, to file a complaint, “But in that line of work no one is going to come forward and tell the truth about any incident that happened to them. They don’t want to deal with the retaliation. They don’t want to have to deal with being marked. You get labeled and then you are ostracized from working with other officers, which is what they did to me.”

B, who had a college degree and a middle class family to fall back on, quit before she filed her lawsuit, but of the other women in her workplace she says, “Except for one girl, who left right after I did, she was the only one married and her husband was a police officer, so she had someone to fall back on. But the rest of them, they hated him but yet they went along with it. I only attribute it to that they just really wanted to keep their jobs.” Many women continue to expose themselves to abuse daily as a condition of keeping their job. These are often women who have children and families dependent on them. JJ says, “But I am tired. I am tired working like that. I need to quit, but I cannot quit my job. I have an eleven year old son. I’ve been there for over 30 years. I am trying to work a few more years, about four more years or so [to retire with benefits], then they can have their job. I think they are trying to force me out before retirement.”

My respondents told stories of coworkers who were unable to escape the hostile environment, and the choices that women often make between their own personal well

⁸On the returned surveys, 80% of the respondents answered yes to the question “Did you leave your job as a direct or indirect result of the sexual harassment?” Of the 14 who answered no, two indicated they had been demoted, and one wrote “not yet.”

being and the economic need of those who depend on them. R describes the situation of a colleague who felt she had to put up with the harassment in order to support her family:

She had just bought a home, she was putting her children through private school. So there was a lot at stake and a lot depended on that income. But in turn, she had to take drives with [her boss], and go to different sites. And instead of him teaching her how to inspect the sites, he would subject her to a lot of physical and verbal sexual innuendo, things of that nature. And she really didn't know what to do. She could not afford to lose her job, that was her main thing.

S reports that many of the women targeted for harassment were single mothers and therefore less likely to complain for fear of retaliation. She describes her decision to file a complaint in contrast to the rest of her colleagues:

They don't want to speak up. They are afraid. When you think about it, look where they are at. If they open their mouths, they will be fired and be just like me. A lot of these women, it is sad to say, but we are single parents. We need our jobs. I can't really expect another woman to jeopardize everything for me, just because she is trying to do the right thing...They [the men who harass] know there is no man, so that makes you more vulnerable to it. In a sense, what I am saying is it is less likely for you to complain if you are the only person you have to rely on. If you have a husband or boyfriend or whatever and he is paying the bills, it is no problem. If you lose your job, you still have him. But if you don't have him, now what are you going to do.

The National Council for Research on Women reports that many women will avoid reporting harassment for fear of retaliation. In fact, many women will choose to quit rather than risk a formal complaint (Siegel 1995). Women often feel they have no choice but to quit to escape the harassment, and many who quit may not get references, may be unemployed for long periods or end up taking lower paying jobs. D says, "I lost everything including my reputation because of what this man did...I totally had to quit my job and move to get this guy to leave me alone....I only worked at [the college] for ten years, I don't have any other references." W tried to mobilize other women in the office to file a class action suit, "I asked people to write down their experience, they don't have

to file a formal complaint. But not many did. One woman left...well, she is a licensed architect and she left and took a position teaching in a grammar school, a cut in pay, just to get out of there.”

Two of my respondents had the financial security and support that enabled them to leave the abusive situation. P is a married woman who decided with her family that living on one income was preferable to exposing herself to continued abuse. B had recently graduated from college and was able to rely on her parents. As a result, she was not entirely dependent on the job, “It was my first job out of school, I was still living at home with my family, so I didn’t need it. I mean I needed it because I just graduated from college. But in the end it wasn’t like I was depending my whole life on that job.” She recognized that most of the other employees were not as fortunate: “They have illegal workers in their factory from Guatemala...and god knows what they pay them, but there is like 50 workers in there that are illegal immigrants. And they take total advantage of them...but they never said anything.”

My respondents engage in a careful weighing of options and consequences before filing a formal complaint. They know they are likely to elicit disapproval at best, more likely they will endure retaliation and possibly lose their jobs. They do not exhibit an idealized view of law as an easy or clear solution. Rather, they are very practical in their assessment of the situation. V discusses the misperceptions of men in her workplace, her reservations about filing a complaint and how she finally decided to speak to a supervisor:

So [the guys think] women would be ready to sue at the drop of a hat. So there is that perception, which is not true; because you don’t want to be involved with that. I don’t. It is a big old hassle. I haven’t even gotten this thing resolved for two years. But you could put yourself in a precarious position, it is stressful, and there

is a whole lot of other issues. So you don't want to have to go there. But that Friday when he kind of pulled me to him, I realized okay, if he had, what would have happened. But also that he wasn't taking my no, he was just not taking it. So that is why that Monday I did come in and spoke to the shop steward that he was going to have to speak to him.

These women recognize that going through the legal system can be a very difficult and demeaning experience. C did not intend to report the harassment. It was her supervisor, who heard her scream and reported it to the EEO office. At that point C had no choice but to deny the experience or go forward with a complaint. She says her earlier experience with a rape claim led her to be wary of the legal process, "This is worse than what I thought would happen. I was raped when I was a teenager. The guy did go to jail, but it was just going through hell. You know, you asked for it, it's your fault...I knew that is what would happen."

Women will chose the hard road of filing a complaint when have lost something substantial and tangible such as money, job, or benefits, and they see the legal system as having the power to compensate for their loss. A describes the loss of income and the cost to her family that resulted from her losing her job, which motivated her to file a complaint:

Really I just wanted my six months that I lost, and I'll tell you why. I had an account for my daughter, saved for her college. Well, when I wasn't getting any income for six months, I had to attack that for my bills. Now I am saying to myself I have to replace this. It is like my daughter paying for it, even though it was my money; but I gave it to her. It was like a college fund type of account. And that really made me more mad than what I went through with him, because now it is affecting my daughter.

After enduring harassment for years, the promotion of her tormentor to the position of director of the department encouraged W to file a formal complaint:

Then after a few years, he became the director. And it got more intense. It got really bad. What happened was when he became director, I had been keeping a

file for about five years, just a record, a journal, of some of the things he said and what went on. And when he became director, I was really concerned about what kind of jobs I would be getting. He gave me meaningless work, busy work, so I was concerned about what kind of jobs I would be getting and what my job evaluations would be....So finally I decided I couldn't take it any more and I filed a formal complaint with the EEO.

Although W was demoted after the complaint, she explains that as an older woman, even with a professional degree, finding another job would not be easy, so she continues to work at the same agency and endure the retaliation, "The field is not an easy field to work in. It is very volatile depending on the economy. I had been, when I graduated, laid off and out of work for a long time, with two kids. So I wasn't about to leave, it is a city job and is secure."

For some, appeal to the law represents nothing left to lose. S weighs the problems filing a complaint would cause against her own personal anguish and describes the change in her attitude after enduring the harassment, retaliation and continued disregard of her supervisors:

But you do change, because at first I was kind of scared and didn't know really what to do. But it got to the point where I was getting physically and mentally ill. And I couldn't take it any more...But I choose to do it because I was tired of it. It was to the point where they were telling me every day that they were going to fire me any way, so why wouldn't I go and make a complaint and try to get some help?

Filing a complaint against sexual harassment can have disastrous consequences. R reports the impact of being fired as a result of her complaint:

Well, I knew that was my biggest fear, losing my job. So after that happened it was like my worst dream had finally come true, so after that I really went through various stages of emotions. Absolute terror, no way of paying my bills. Absolute shame, because now I was fired from a job I had worked hard for, I had two years in the company, I just didn't have time in that position. So everything I had been building, for a young person to be working some place solidly for two years, that is a lot to lose - a good job. So, a lot of friends and a lot of connections were gone, a lot of bad blood established.

The legal, economic and workplace power structures are stacked against these women. The low rates at which women file such complaints indicate that they are well aware of this situation. Even when they identify a legal wrong, a legal solution is not readily attainable. In examining the experiences of and responses to sexual harassment, we can begin to articulate a response to the question of the title - why didn't she do something about it? Using the framework developed for understanding how disputes are translated into legal claims offers insight into the many obstacles women face in transforming the harm of harassment into a complaint with the weight of law. Although sexual harassment has been defined as illegal discrimination and recognized as such by the U.S. Supreme Court and most businesses and institutions have anti-sexual harassment policies and procedures, many women do not identify their experience as harassment. Social attitudes encourage them to believe that they are at least partly to blame for their own victimization. The interviews with my respondents support the argument that social attitudes which normalize sexual abuse and violence against women and the prevalence of such attitudes among male supervisors encourage women to ignore or minimize their experience of harassment.

As with other forms of sexual abuse, women internalize the messages with normalize the harassing and abusing behavior of men and place the blame for such actions on the victims themselves. Often, it is not the behavior itself which allows women to understand their experience of harassment as discrimination, but the ancillary actions, such as retaliation, inhibited ability to function at work or threats of firing and actual loss of employment and benefits. Even when my respondents understood that the harassment

they suffered was illegal and that their employers were at fault, they were not eager to file a formal grievance or legal complaint. Most of my respondents were aware of the existence of sexual harassment policies and procedures in their workplace, but they also understood that implementing such procedures would come with great costs and possibly little result.

Despite significant progress in sexual harassment law and doctrine, the courts have very limited ability to change the workplace environment in which sexual harassment occurs. Felstiner's framework for examining how harms are translated into grievances, provides a way of understanding why the harm of sexual harassment is so rarely transformed into a legal complaint. In the next chapter, I take a closer look at how the power dynamic in the workplace and the procedures of filing a sexual harassment complaint, creates additional obstacles in the path of those few women who get through the naming and blaming stages and try to mobilize sexual harassment law on their own behalf.

CHAPTER 4: THE GATEKEEPERS

Before the Law stands a doorkeeper on guard. To this doorkeeper there comes a man from the country who begs admittance to the law. But the doorkeeper says he cannot admit the man at the moment...Since the door leading to the law stands open as usual and the doorkeeper steps to one side, the man bends down to peer through the entrance. When the doorkeeper sees that, he laughs and says; "If you are so strongly tempted, try and get in without my permission. But note that I am powerful. And I am only the lowest doorkeeper, from hall to hall keepers stand at every door, one more powerful than the other...These are difficulties which the man from the country has not expected to meet; the Law, he thinks, should be accessible to every man at all times (Kafka, 1946).

Listening to my respondents recall their experiences navigating the legal process brings to mind this parable from Franz Kafka's *The Trial*. Like the character in Kafka's parable, my respondents are presented with the illusion of law as an open door. However, when they attempt to enter, by engaging the power of law on their own behalf, they are confronted with numerous obstacles, and find their access to the legal system impeded by many gatekeepers.

In the previous chapter I reviewed the experiences of my respondents in the early stages of the transformation process, as they sought to understand and identify their experience as a legal wrong. In their work "Naming, Blaming and Claiming" Felstiner, Abel and Sarat (1980) assert that perceptions and experiences of individual actors influence decisions about whether or not to engage the legal system to resolve disputes. The transformation of injuries into legal disputes is a dynamic social process; as individuals interact with other people and institutions their perception of their experiences and their legal options may change. Felstiner et al. identify disputes as social constructs, as such they are dynamic and subject to re-interpretation as a result of experience and interaction with others.

In this chapter I will examine the experiences of my respondents as they continue the process of transformation in an attempt to engage the legal system. The appeal to law and justice begins with the individual who perceives an injury and acts on it. Felstiner et al emphasize the importance of studying the transformation process as it occurs, “It means studying the conditions under which injuries are perceived or go unnoticed and how people respond to the experience of injustice and conflict” (Felstiner et al., p. 632).

Large scale changes in law and social policy are dependant on the transformation of individual harms into legal claims. In order to better understand how individual actions become opportunities for legal change this project puts those individuals at the center of my study. As individuals go through the transformation process they redefine their perceptions of experiences. Communication and interaction with a range of people, including friends, family, colleagues and authority figures, can influence attitudes, behavior and expectations. The internal process of evaluating and re-evaluating one’s experience in the context of law and legal rights forms legal consciousness. Legal consciousness represents the ways in which law and legality inform perceptions and responses to a given situation, and the way that individuals translate harms into legal disputes.

Although a significant body of scholarship has developed around sexual harassment law and doctrine, the case law represents only a tiny proportion of incidents of sexual harassment. The majority of women who experience sexual harassment in the workplace may not name it as a legal wrong, and even those who identify the behavior as harassment do not necessarily appeal to the legal system to resolve the problem. The EEOC reports less than 10% of sexual harassment complaints result in a finding of

“reasonable cause” (which means that an EEOC investigation found reasonable cause to believe discrimination occurred). After such a finding, only about 5% will be considered for litigation.⁹ The focus on the individual in the transformation process recognizes that the vast majority of disputes never achieve the status of case law.

Within the halls of power, changes in doctrine and legal definitions can influence the outcomes of cases, but only for those who already have access to the halls of power. Changes in sexual harassment doctrine have little impact on the women who find the doors to the law blocked. A crucial element of this project is the focus on individuals as they experience the transformation process and assess their situation and legal options. The transformation process and legal consciousness are informed by interaction with the legal system and legal actors. By focusing on individuals and their experience with the legal system, this study will shed light on the internal process that occurs as an injury is transformed into a dispute before it appears on the court’s docket. Examining their experience with the legal process as my respondents transform their injury into a legal issue provides important insight into the question of why so few women get to the final stages of filing a sexual harassment complaint as a legal claim.

This chapter explores the obstacles that my respondents face in their effort to bring the law of sexual harassment to bear on their situation. As they attempt to engage the law they find themselves confronted with a series of gatekeepers; individuals and institutions which may obstruct or prevent their access to the law. These interviews illustrate that the imbalance of power and social attitudes about women which contribute

⁹ From 2002-2006 the EEOC reports and average of 7.9% of sexual harassment cases result in finding of reasonable cause, and an average of 5.5% were recommended for litigation - how many of these result in actual litigation is impossible to tell.

to harassment also inform the very process through which respondents attempt to engage the law.

The Power Structure in the Workplace

The first gatekeeper these women encounter when considering filing a sexual harassment complaint is the workplace itself. Social institutions, entrenched attitudes about gender, and the power dynamic in the workplace can serve as powerful gatekeepers for women as they attempt to mobilize their legal rights. In her study of the mobilization of employee rights under the Family Medical Leave Act, Albiston (2005) found that power relations and the social institutions of the workplace have a significant affect on how workers evaluate their options and mobilize their legal rights. She asserts that workers negotiate rights not only ‘in the shadow of the law’ But also in the context of other social institutions and existing practices, deeply held beliefs, and assumptions about work and gender, “preferences about mobilization do not seem to be pre-existing and static; instead they emerge from an interactive social process that is shaped by existing cognitive and normative structures” (p. 42).

My respondents describe a power dynamic in the workplace which minimizes complaints and inhibits action. Many of them describe extremely hostile work environments and an institutional structure which reinforces gender based discriminatory attitudes. This was especially true for public sector workers. Seven of my respondents worked in the public sector, five for city agencies, one for the state and one for the federal government. All the of the respondents who worked for city or state agencies spoke at length about an extremely hostile working environment and institutional powers that protect the status quo and create obstacles for women who try to access the law.

S, the police officer who was harassed first by her instructors at the academy and later by her superior officer, describes an environment rife with sexualized hostility which was accepted as the norm:

I lost my life and my livelihood all because a few men and the fact that nobody held them accountable for the things they were doing...In a way it is like the men in that particular job, they are out of control, completely out of control. They have no one to answer to. They have so many people rallying behind them, to conspire together, to come up with any excuse that is going to just cover it all up and make it okay, when it is wrong. That is the only thing that really gets me. It is tolerated.

JB, who worked for a large city agency describes a workplace environment and power structure with minimal oversight, in which sexual abuse and a hostile work environment are tolerated or even encouraged:

And you don't want to come into this place where you have ten men sitting around watching a playboy channel playing with themselves. But you had to do it. And it is going on now. I am not there, but I know it is going on. Nobody is going to approach it... There are no rules or regulations, you are in charge, you do what you want.

Among my respondents, the public sector workers described the most virulently hostile work environments which included explicit gender discrimination and a workplace power structure in which the men would band together to defend and support one another. JB continues:

Many times the things that happen, it is not because something happened between you and a guy. He may walk away but his friend will get you later on. So they were operating, the person who signed my termination, he was operating because of his friend. You didn't sleep with his friend, so he got very upset. So okay, I'll get even with you.

Eleven of the twelve respondents described workplace environments that explicitly or implicitly practiced gender based discrimination (the only one who didn't expressed anger and dismay that a college run by women would treat harassment so casually). W, a middle aged professional woman, the only one of my respondents with an

advanced degree, describes a workplace power structure that kept women in low level positions:

Another woman told me that they don't hire women into the management positions, and that when one came open for a department that was not really significant as far as decision making goes; when it came open the chief designer said that they don't like women, meaning above him. And he was going to keep this one position just for women... There are no women in the administration office. They don't post. And there are no people of color either. They don't post a position when it comes open. It is not right. And the things they say about women, it is not right.

V, the successful carpenter, has worked hard to make it in a male dominated field.

She has developed a thick-skin and is determined not to let the men marginalize or demean her ability. However, she acknowledges that she confronts gender and race bias regularly:

There is always going to be the issue that we are not capable and what are you doing here, and that is still there... I am a black woman also, so there is the discrimination there still too. If anybody was able to survey a job, you will see what people tend to do what work; but also because I am a woman, there is the very general idea that you can't quite handle the work.

JB worked for 30 years in a male dominated field which is part of a large city bureaucracy. These civil service jobs are well paid and provide good benefits.

Accordingly, she says the men are resentful of female intrusion into their previously all male workplace:

They don't want women here. Women get in the way. They are angry, they sit around and talk about their alimony and child support, and women taking over all the OT from them...They don't let women in that environment. It's a man's world.... So unless you go along with their program, if you don't go along, they will do whatever they can do to get rid of you. Because they have to show you they are in charge.

Although none of my respondent's would ever use the term patriarchy, they are painfully aware that the system reinforces male power and privilege at the expense of

women, and that their gender and sexuality are counted against them. S states, “Pretty much it comes down to women, we are not taken seriously, we are not given a lot of regard, and it is insulting. It could never be on the other foot in my opinion. I don’t ever think there could be a bunch of men taken advantage of at work the way women are.”

Prevailing social attitudes about gender and sexuality, and a male dominated hostile work environment, serve to create a norm in which sexual harassment is tolerated. In such a hostile workplace environment, stereotypes about gender and sexuality are prevalent and play a role in the distribution of power and influence. R reports that it was assumed women would use sex to advance themselves in their career:

I think it was a given that was a way for women to come up and rise and improve their career, if they allowed themselves to be touched or fondled or whatever came their way. I think they saw that before I did, but there was one particular woman who I was able to confide in. She saw what was happening, but I think a lot of the women did not support me as much as I would have liked to be supported. Because I think a lot of them felt envious of that situation, I think a lot of them if they were in that position, they would have allowed it to happen; because they feel that is the way to move up. It is a very male dominated environment, and it is a way to get over. They think that is not too much of a compromise to do sexual favors; in fact, they feel that it might be the easy way out.

Confronted with institutional discrimination and a sexualized hostile work environment, it is not surprising that most women never translate their experience of harassment into a legal claim. Some women accept sexual harassment in the workplace as inevitable, and some decide their best option is to tolerate the harassment in order to preserve or improve their position at work. S describes the situation of her colleagues:

Like I know with the girls I came out with, they weren’t in my precinct, but the ones that worked up in the [other precincts], they were also single parents with children, that is exactly what the case was. They had a sergeant who was bothering them, and one of the girls actually ended up going out with the guy just to get him off her back.

Implicit in the male dominated, anti-female work environment is a threat to those who would challenge the status quo. All of my respondents were subjected to some form of retaliation when they voiced a complaint of harassment. Three were summarily fired after filing a complaint. R, who works for the same agency as JB stated:

I was summarily fired immediately after I filed my complaint with the internal office. On that same day I was fired. With no recourse. I could not even empty my desk. I was thrown out the door, stripped of my identification. Told to leave now and everything I had would be sent to my home. Believe me, after I went down and filed a complaint, I was fired that same day.

B describes how her treatment changed after she confronted one of her employers about the harassment, and after a short while she was let go:

Then immediately after, all of a sudden, she was critical of my work, day in and day out. What are you working on? Who are you talking to?... And everybody in the office noticed. Like any time she could attack she would, verbally attack me...Finally, one day a month after I complained, she called me in and said we are going to have to let you go... She said if you want I will give you a good reference. You can leave right now, I'll mail you a check, bye. I was like okay, done.

JB describes how she was fired the first time she tried to stand up to the harassment:

One of my complaints was breast exams when I was at work....We reached a point where I refused to cooperate one particular day. Because my medical was kind of strange. I would go and be asked to undress...It was very clear what they were doing. I said I had a breast exam yesterday and I am not cooperating today. They said if you don't then you're fired. So they fired me the first time. They fired me for not following orders. They didn't think order was to take off your clothes, but eventually it came out....Now it came out I filed a complaint with the procedure. And it came out and they told were told to give me my job back, which they did.

The condition of getting her job back was that she sign a statement withdrawing her complaint.

Even the respondents who were not summarily fired, were nonetheless subject to severe forms of retaliation. S reports that after she tried to speak to the patrol officer about the harassment her situation became much worse. Due to the nature of her work as

a police officer, she notes that the retaliatory actions of the department could be life threatening. She had heard reports of situations in which an officer targeted for retaliation had called for backup and no one would show up. In her own case:

They had me working by myself doing foot posts solo, on midnights and all kinds of tours. I ended up getting into a shooting where I was injured, and it became a thing where they didn't care any more. I was out on patrol with those hand splints on, I had a very low range of motion. I am out there with the hand splints on, not qualified to use a firearm, and they put me out on patrol.

C, who was harassed by a prison guard, was told by her boss to expect retaliation. Given the violent tendencies of the individual who harassed her, this threat caused her extreme anxiety:

...she said she heard it from the commissioner's office that there will be retaliation. So expect to go out and find your car slashed, I mean this is like the day after we had the report in. I got the word that they were talking about retaliation....So that was like from the day she called in, that was the date she reported it. So yeah, she said there is going to be retaliation, and I know this guy's propensity for violence, they are all gun nuts.

Employers were reported to manipulate the existing power dynamic of the workplace to further minimize potential complaints. A number of respondents identified the propensity for hiring women who were single and therefore without another source of income, as those more likely to endure an abusive working environment in order to keep their job. S spoke about the particular the targeting of single women who are especially vulnerable:

...they know there is no man, so that makes you more vulnerable to it. In a sense, what I am saying is it is less likely for you to complain if you are the only person you have to rely on. If you have a husband or boyfriend or whatever and he is paying the bills, it is no problem. If you lose your job, you still have him. But if you don't have him, now what are you going to do?

B, who worked for a small privately owned company and was harassed by the owner, she also noted a propensity to hire women who would be particularly vulnerable,

“When I first started I noticed that everyone in there is young and single women. None of them were educated, I was the only one with a college degree. They were very, very sweet, but most of them pretty much really needed that job. They were holding on to the job for dear life.”

R states that she was harassed from the moment she started working. As a new employee she was particularly vulnerable, “I was sexually harassed under the guise of being trained in the job. My boss was finding every opportunity to rub my chest with his hand.” Since there was a six month probationary period before workers are eligible to join the union, this individual took advantage of her relative powerlessness. “I was not in the union yet, I was still on probationary status...he knew I had no union backing. He knew that I had no protection.”

Social attitudes about gender and sexuality in the workplace form the background from which my respondents view their experience of harassment. These social attitudes and institutional workplace power structures serve as gatekeepers that discourage women from transforming their experience of harassment into a legal claim. A hostile environment and power structure which normalizes inappropriate sexualized behavior in the workplace can inhibit women from articulating the wrong done to them and translating it into a complaint. Although ultimately all my respondents ended up filing some type of formal complaint against the harasser or the employer, these gatekeepers played a significant role in discouraging them. A sense of impotence or futility is evident in their comments. S reports, “I went up and followed the proper chain of command and it came right back down to the same person I was complaining against. All he would do is laugh, he would literally laugh at me from time to time and say you are just so stupid.

You just don't know how things work here, do you? And it was stupid."

After being reinstated in her position, JB continued to experience harassment and expressed a sense of helplessness about her situation; "The so called superintendent who was driving me nuts...said there is nothing you can do about it. And he was right, there was nothing I could do about what they do to me. They do anything they want, they are in charge."

JJ is an older woman working in a predominantly male environment at the postal department of a large federal institution. She describes how her efforts to improve her workplace situation by furthering her education were undermined her director:

I said let me see if I can get myself better knowledge with the computers. So I took a few classes, Word and Lotus and things. So when I passed the course and got a certificate for the course, but the chief said to me I don't know what you are going to school for. You are never going to be promoted in here, we ain't got nothing for you. And you are not going to be transferred either, because if you go to personnel, you can apply for a transfer and they are going to call me. What do you think I am going to tell them? So there is no need for you to go to school... He was one of the staff directors. He is the one who told me that, he just told me he don't know what I am going for. He is never ever going to promote me and I will never be transferred. He told me this. So I just said he is right, I made up my mind and said he is right. So I stopped applying for transfers for a long time.

My respondents are well aware of the power dynamic in the workplace and their own relatively powerless position. R describes how her supervisor, who was known around the office to be guilty of harassment, would preempt any complaints by interrogating (and implicitly threatening) her co-workers:

He was literally asking every employee, did you ever see me becoming abusive to this person? Did you ever see me sexually harass this person? So every person within that office was asked by him, their boss, if they had observed him doing anything wrong...He kept picking and plucking, it was just as if you are in a pack of animals and you were prey.

Eleven of the twelve respondents were harassed by superiors, either their immediate supervisors, departmental or division supervisors, or the owner or president of the company. The supervisors and managers who often tolerate or actively participate in the harassment created additional obstacles to filing a complaint. One respondent watched as her harasser was promoted over the years. W states, "The assistant deputy director started from the minute that I got there making snide comments, etc. Within a short period of time, he became a deputy director, so he was second in charge. He began giving me really negative evaluations ...Then after a few years, he became the director. And it got more intense. It got really bad."

JB, who was harassed by the superintendent of her division, expresses her powerlessness in the situation, "But he is the superintendent. There is a certain amount of, well, I knew he knew how to do things, as far as getting people fired. I've seen him set people up." When she appealed to the union representative, "...he stood there and looked at me and said you are crazy, you ain't nothing but a little pussy. That was his response after they had taken my money all those years."

Although C was harassed by a prison guard, who had no official connection to her clerical position, she was cognizant of the way other men in positions of power insulated and protected the harasser from complaints. "I didn't report this guy, and why? The guy's supervisor, who used to be my boss, he used to hassle me... he is vindictive, and he is this guy's boss. And every time a woman would put in a report about this guy, it don't go any further."

S notes that the only police officers who had successfully sued the department for sexual harassment discrimination were officers. She asserts that unless you are a high

ranking individual, no one is going to pay attention to your situation:

And pretty much it seems like if you are not someone that is out there getting a lot of media attention, they don't pay you any mind. When I said that I meant like some of the fraternal organizations you see constantly speaking about the injustices with the police department, and those females that had enough rank to make a difference when they filed a sexual harassment suit against them.¹⁰

The experiences of my respondents illustrate the various ways in which the power structure of the workplace served to disadvantage them and impede them from following through on their complaints. In their efforts to move forward in the complaint process, they confront a social system and workplace hierarchy which attempt to diminish, deny or diffuse their complaints.

Sexual Harassment Policies

Today, most large employers have some form of sexual harassment policy. In addition to state and federal agencies and corporations, most colleges and universities have instituted sexual harassment policies. Following the Ellerth and Faragher decisions, courts have taken the position that victims of sexual harassment must first go through an internal procedure which has been established by the employer. In effect, the law has shifted the burden of proof from the employer to the employee who must show that they have attempted to utilize the internal procedures. Accordingly, before filing a complaint with an external agency such as the EEOC or an attorney, complainants are advised to go through the employer's sexual harassment complaint procedures. However, the effectiveness of these policies and procedures in preventing and addressing problems of

¹⁰The recent, much publicized case of harassment by the coach and executives of the New York Knicks organization supports this assessment. The woman who was successful in her lawsuit was a high level executive in the organization.

sexual harassment remains very much in doubt.

When changes in law require the implementation of policies and procedures that go against established organizational values and practices, they often meet with strong opposition. A growing body of research indicates that internal EEO procedures, rather than resolving employment discrimination issues, can actually serve to prevent employees from pursuing further action and to insulate the employer from liability and lawsuits. A 2001 AAUW study confirmed that despite the fact that a growing number of colleges and universities have implemented written policies against sexual harassment and distribute educational materials about harassment, students rarely tell school administrators when they are being sexually harassed (Paludi & Paludi, 2003 p. 176). In fact, there is no indication that rates of sexual harassment have declined as a result of university adoption of sexual harassment policies (Hawkesworth, 1997).

In response to changes in anti-discrimination law, employers may implement anti-harassment policies as a way to create a sense of legitimacy, to insulate themselves from legal challenges and avoid liability, rather than as a genuine effort to address the problem. The creation of such procedures does not necessarily mean that the organization is committed to the legal ideals of anti-discrimination law. Organizational theory suggest that such policies are primarily influenced by the organizational context and are more likely to serve the employer in preventing liability than to serve the needs of victims of harassment. Edelman (1992) found that organizations may create “visible symbols” in response to legal changes, such as sexual harassment policies or discrimination complaint procedures. In fact, public organizations and those with federal contracts (such as large universities) are particularly likely to create such symbolic structures. Some studies have

suggested that the mere presence of anti-discrimination or sexual harassment policies serve the goals of employers to insulate the organization from accusations by creating the appearance of attention to the issue, while minimizing the intrusion of law on the functioning of the organization (Edelman, Erlanger & Lande, 1993, see also Ahmed, 2004).

Although human resource specialists in large corporations are likely to have a working knowledge of the legal guidelines of employer liability for sexual harassment, few have any real understanding of the problem of harassment or the factors that contribute to harassment in the workplace (Gutek 1996). The effectiveness of an anti-discrimination policy is often dependent on the individuals responsible for implementing those policies. In a study of EEO officers from large employers, Edelman et al (1993) found that the individuals charged with taking complaints and investigating allegations of discrimination generally prioritize organizational and management goals over legal ideals. These internal EEO complaint policies and the individuals who oversee and implement them serve as the another set of gatekeepers between my respondents and the law. The task of these gatekeepers is primarily to protect the employer from liability and lawsuits, rather than ending the harassment.

Ann Marie Marshall (2005), in her study of the grievance procedures at a large mid-western university, found that rather than encouraging employees access to equal protection entitled by law, the way in which the grievance procedures were implemented created additional obstacles for employees trying to assert their rights:

By adopting the written policy, the university fulfilled its legal obligation to protect its employees from sexual harassment...Yet the policy proved far less protection in practice than it did on paper...managers often interpreted the written policy in a way that protected university interests. But rather than offering dispute

resolution to aggrieved employees, university supervisors frequently deflected employee complaints about sexual harassment...In turn, these management practices shaped women's responses to their own experiences with unwanted sexual attention (p. 117-118).

These studies are consistent with my own findings in which respondents' description of internal complaint procedures confirms that in many cases sexual harassment policies, complaint procedures and those who administer them serve as an additional gatekeeper to prevent or discourage the employee attempts to mobilize the law on their behalf. My respondents invariably spoke of internal processes disparagingly as designed to intimidate and obstruct further complaints. Individuals authorized with investigating and enforcing sexual harassment policies employed a number of devices intended to preclude the complainant from access to her legal rights. These include; minimizing or deflecting complaints, recasting them as interpersonal or managerial problems, and defending the harasser (this is especially true when the perpetrator is part of the organizational power structure or has a relationship with the individual taking the complaint). In addition, the responses to complaints often reflected organizational priorities rather than an effort to address the violation or punish the perpetrator.

All seven of the respondents who worked for public sector employers were aware of the existence of sexual harassment policies or Equal Employment Offices where their claims were supposed to be addressed. When speaking about the employers internal sexual harassment complaint procedures, without exception, my respondents described policies and processes which were ineffective, ignored or openly defied. D attempted to follow the sexual harassment guidelines of the college, "I called the president of the college, I called the sexual harassment committee. I followed everything in the guidelines. I told this man to back off, but he never backed off." Despite her effort to

follow the guidelines established by the college, she found herself at odds with the person in charge of implementing the policy:

First of all, I assumed there would be some sort of communication between myself and the coordinator...I thought that I was communicating with this woman, but I realized there was no communication. There was some sort of greater matrix at play here that would not communicate with me. I was like on the outside of this wall. I felt very much as though the college was even telling this man [the harasser] what steps to take.

Many respondents suggested that rather than addressing their concerns, the policies were designed to thwart complaints. JB asserts that, "The departmental investigations, they are not going to do anything but wait and those guys are getting off free...the complaint department is men basically. I was fortunate, when I filed this complaint, there was a female in there at the time...and she made the mistake. She did not know, she was new, and she took my complaint, and they fired her."

In some cases the internal policies served as a smokescreen to protect the employer and give the impression of compliance, while being openly ignored. W spoke about the educational workshops on sexual harassment that were held in her office:

[the division] does have a policy where they have to educate people about what EEO is and what our rights are. So they do workshops once a year that everybody has to attend and we have to sign that we went. The last year that I was in architecture, the director signed a time that he was going, he signed up for one of the workshops. I waited until he did so I could pick a different workshop, because I wanted to be able to feel free to talk. So I signed up for a different workshop, and the day I walked in there, there he was, sitting in the workshop.

Although the employer had an EEO department and held workshops to educate the employees about the policy, the director, who was also W's harasser, thwarted her attempt to speak openly about her problems in the workshop. She discovered the disconnect between the routine workshops offered by the employer and actually filing a complaint:

I really didn't expect to be punished for filing with EEO. I didn't realize that there was such a conflict of interest there. So, it was quite a shock when I was punished. I was surprised when I went into the EEO director's office and she was so negative. She wasn't very supportive at all...Of course, there were some people who knew that [the department] does have an unwritten policy also that if you complain, you get punished. So their EEO policy is not very, well, it is a very hypocritical policy.

Although the EEO policies were promoted among employees and the EEO office was available to take complaints, it was conventional wisdom in her workplace that acting on these policies carried significant risk.

Similarly, C reports that after her complaint she was required to attend a meeting regarding the organization's sexual harassment policy which seemed to have no relationship to her actual experience:

And it is horrible, we are in this room in the basement of a prison. And there are bars on the windows and the top of the walls. And we are down here and they are telling us [about] sexual harassment - even if you feel you are being harassed, most people wouldn't; but if it feels uncomfortable to you, you report it. I am hearing this three months after the fact. And I listen to all this, and they said, I have a right to get a written reply and a determination letter within 60 days.

She contrasts the information provided by the employer with the seven months that went by after she filed the complaint, "Well, seven months go by and I didn't get a reply. They don't answer my email or my phone calls, this is EEO. What is going on?"

In an effort to avoid liability if a lawsuit should emerge out of a complaint, internal EEO officers may make a big show of an investigation. In some cases the investigation may be more of an effort to create a file for a potential lawsuit than an actual inquiry into the allegations of discrimination and harassment. JJ describes the ways in which management would use an internal investigation to undermine her complaints:

And when a person did an investigation, along with the equal opportunities officer, it was in the report that I was this difficult person. The way they explained it in the report, I am this difficult person who always seemed to intimidate other

workers and always trying to be too bossy, trying to tell other people how to do their jobs, and how I intimidate everybody when I am working. That was in the results of that investigation. So I had to accept that and I just let it go.

My respondents, who attempted to go through the appropriate process, were often dismayed by the response. At every level of the process, gatekeepers impeded victims entry to the legal system. S describes attempting to go through the various levels of the complaint procedure, which went nowhere:

I went through the precinct level representatives, they call them delegates. And that was pretty much it. Mostly they told me there was nothing they could do, they told me it was more like an EEO situation...And even when I eventually did start writing letters to the EEO office, they [the precinct officers] denied everything....Then I wrote letters to the chief of patrol's office. That went nowhere...It was ridiculous It went like that all the time.

D expressed her frustration and anger at the incompetence of the college's sexual harassment policy. Although she attempted to follow the established complaint procedure, her efforts were unsuccessful. After feeling that her complaints were being ignored or dismissed, she summed up the college's sexual harassment policies this way:

The process is a damn shit joke, and I hope this is recording. I will explain. An institution can put together a committee to take care of sexual harassment. And they can hire someone from the fucking kitchen to be the coordinator of that committee. That doesn't mean that all of a sudden a kitchen worker knows shit from shangola. They have people handling it who really haven't even come to terms with themselves. They wouldn't know sexual harassment from someone pissing on their head. I don't know what to say about it. They handled me disgracefully. That is what I have to say. The people in charge, that is.

My respondents described the ways in which sexual harassment policies operated as symbols to give the impression that the employer was responsive to concerns about sexual harassment in the workplace. C spoke about mandatory EED meetings that the supervisors were supposed to attend, and how the supervisor of her harasser joked about how he never attended them. "They had to send the supervisors, it was mandatory for all

the supervisor's to go. And [her supervisor] would never go. Any way, who am I going to report it to? Him. So he wouldn't go to this. They would schedule it and he would call out sick or whatever."

V describes the efforts of the one of the owners on a construction site to make a point of letting her know that they were addressing the issue, "I will say it was one of the owners who was at the job site, that he said he had a conversation with the workers, like before I came. There was a woman coming on site, and to basically be respectful of her, don't do anything inappropriate. He said he had the conversation, but the steward told me that never happened. I guess he was trying to make himself look good." V is a member of the Carpenter's union and the union by-laws included a sexual harassment policy, but as for the effectiveness of the union's sexual harassment policy, she says:

There is a clause in [the union] bylaws, there is a clause about harassment. And that is what this fell into. And it wasn't taken seriously. Because when you can't get a call returned back in months, two months or so, more than that. That is an indication, if not a clear sign, that it is not taken seriously, that they don't care... I haven't gotten the answers that I needed from them. I don't feel I was treated with respect and with the seriousness of the issue. I made calls and faxes and calls and faxes, and it is like they were trying to give me the run around and make it go away.

The gatekeepers, who are given the responsibility of responding to and investigating sexual harassment complaints would utilize a number of strategies to diffuse the situation while protecting the interests of the employer. In some cases they recast the problem as one of personnel or management issues. W describes how internal complaints fell on deaf ears, "A number of us went to the chief, over the course of time, which is the director's boss basically. And he did nothing. In fact he said that whatever this guy was doing as director was his management style."

In other cases the gatekeepers would try to diffuse the complaint by lending a

sympathetic ear while denying that any actual discrimination took place. JB asserts that the EEO officers would try to minimize the situation by denying the seriousness of the allegations, “They don’t really take your complaint... They tell you oh, it is just your time of the month....you’ll be all right. You are upset. So they don’t take complaints. And the next time, here is the crazy woman again talking about a complaint. Come on, you’ll feel better tomorrow, you’ll be all right. Would you like a cup of coffee?”

Those responsible for implementing the employers’ harassment policies have a great deal of control over the process and whether complaints were investigated. Consistent with the research which suggests that organizational priorities overshadow issues of discrimination, EEO officials working for the employer would find ways to discourage complaints. S describes how the EEO officers tried to deter her from following up on her complaints:

And anything I sent them, they sent it back, unfounded, without merit. As if there was nothing wrong that any other officer or supervisor could do that I was complaining about....They would call me up and give me a sort of lecture over the phone about how I shouldn’t be a trouble maker and challenge authority. It is not going to get me anywhere but fired, which is eventually what happened.

C was reluctant to file a complaint about the incident with the prison guard because of her previous experience with the legal system after going through a rape trial as a young woman. However, her supervisor told her that she should report it to internal affairs. She was called into the internal affairs office after her harasser had already met with them and denied the incident. “They talked to me for a while, and said what happened. I said I screamed. And they said, well, one of you is lying. If it is not you, then you have to go to EED, equal employment. But they said you can stop it right now, just say nothing happened. But I said something did happen.” When she reported to Equal

Employment Division they seemed more interested in keeping the incident quiet than addressing the complaint, “So what they told me when I went to EED is you can’t talk to anybody....you cannot discuss this with anyone. I couldn’t talk about it, but evidently he talked about it with everybody. But I wasn’t allowed to talk about it.”

The gatekeepers, working as they do with the organizational priorities in mind, often try to protect the harasser, especially if the perpetrator is a high ranking official and it would be in the interests of the employer to keep the allegations from becoming public. D was an administrator at a city college who was harassed by a professor who had been a department chair for 25 years. Although D asserts that many people in positions of power and authority knew about the harassment, the college defended the perpetrator in order to protect their own reputation, “Many of my classes, as a matter of fact, were taught by the man who harassed me...He constantly told me the positive encouragement he received from his male colleagues in the men’s room. In front of the president of the college and every other public official, he just harassed me.” Her anger and frustration extends beyond the experience of harassment to the way in which her harasser was sheltered and protected by the institution, more intent on protecting their reputation than ending the problem. In her case the offender was able to retire with full benefits and no acknowledgment of wrongdoing:

He sent a one sentence letter of retirement, he said with deep reluctance I am retiring. There was no admission of wrong doing, nothing...The attorney told me specifically, after a long pause, that his resignation as chair had absolutely nothing to do with my case...But still he is responsible, he is my boss, it is so obvious what he did. There is evidence of it all over the place, and there is not a thing I can do...And in the end, he is getting a party... I got a letter asking for money for his party. And he fucking destroyed my life.

Attorneys

Once the harm of sexual harassment is transformed into a legal complaint, the complainant must face the most powerful gatekeeper of all - the lawyers. Because lawyers are recognized as official gatekeepers of the law, interaction with attorneys can have a profound effect on how respondents view their case and the legal process. The encounters my respondents had with lawyers had a significant impact on their perception of the legal system and the decision whether to continue with their complaints. Navigating the legal system without a lawyer seems almost unimaginable. The ability to retain an attorney was the deciding factor for almost all of my respondents in their ability to continue with the complaint. (The exceptions were L, who was advised that she had no standing to sue because she was employed by a temp agency rather than the business where she was being harassed, and V, who decided to proceed with her case pro-se.)

The power of lawyers as gatekeepers to the legal system is indicative of the power structure of the legal system itself. In their encounters with attorneys, my respondents sensed they had little or no power to effect the outcome. Often, they were or were not able to retain attorneys for reasons that they did not understand. Their interaction with lawyers colored their perceptions in predictable ways; those respondents who had favorable experiences with lawyers were more likely to be confident about their decision to pursue the case, those who had difficulty finding an attorney to represent them were generally frustrated in their experiences with the legal system.

Although W's initial interaction with a lawyer served to discourage her, that experience was counterbalanced by the EEO investigation finding in her favor, which motivated her to continue with her complaint:

I got the first rejection from the first lawyer, I might have dropped it at that point thinking my case wasn't strong enough or I didn't have enough documentation or whatever... After EEO found in my favor and I was demoted, I went back to Women's Right at Work, to another workshop with a second lawyer presenting and got their card. They sent me information... I found that much more helpful than the first one. So I did go to see them and they took two months to decide whether they wanted to take the case or not. After two months they did decide to take it.

P worked for a publishing company and quit her job after a few months when the harassment became unbearable. With a husband and a household income of \$50 - \$75,000 she could afford to quit her job and to pay the lawyer fees. Eventually her case was settled (she agreed to speak with me in defiance of the settlement agreement because she resented the confidentiality clause and felt the employer's complicity in the harassment should be made public).

For B, the young college graduate from an upper middle class family, her social and economic status made it easy for to get information that encouraged her to file a lawsuit, which came in the form of a family friend who is also a lawyer, "So a family friend, a few months later, I was just going to forget it, I was just really, really angry at them. I felt like I was abused and then kicked out. He said you have a law suit against these people, it is very cut and dry...He said it sounds to me like they did all the criteria for sexual harassment, and you were fired for complaining." Given her resources and connections, finding an attorney to represent her was not a problem:

My grandfather works part-time at [a prestigious law firm], where Jessica my lawyer is from...They have a whole sexual harassment department. I went to meet with one of the lawyers from their team, I told them my story, and they were like it is every criteria we have, they did every single step. Like a classic harassment case. And I have so many witnesses, I have a really strong case, and they said I should pursue it.

B's interaction with lawyers has been primarily positive, "It is just the one lawyer

Jessica. She is very encouraging, she will try to give me the positive of every scenario; because it seems like every scenario is not positive... I like her a lot, she is a woman, I like that. She is young and aggressive.” Although she wonders whether they will be aggressive enough to beat the dirty tactics she is certain the employer (and his attorneys) are engaged in.

R initially contacted lawyers that were recommended by the union or those suggested by friends, but was not impressed. Of these lawyers she says:

Well, I found them to be lawyers. There was something lackluster about them, something disingenuous. I didn't feel that they actually cared enough. I thought I would be just another client. A lot of them wanted some money up front. I didn't feel the connection there, and I didn't feel like this was a big enough case for them...I didn't feel that they really dealt with sexual harassment, a law firm that would actually do that. Because so many women don't even bring it to this point.

R eventually retained a lawyer through Women's Rights at Work, where she felt she received not only the information she needed, but also the understanding, support and encouragement. “The lawyers they put me in contact with, they were going to be there for everybody. It didn't matter if you were black ... it didn't matter if you were unionized or not. They were going to be out there because this is an issue that affects everyone.” Like B, R felt it was important to have an attorney that understood sexual harassment and was taking her case seriously. This positive relationship with the lawyer seems to have induced a positive attitude in R about her case and the overall experience with the legal process.

JB's experience was quite different. She hired an attorney, but when a hearing was held at the State Civil Rights Bureau, the case was dismissed. Of her attorney she says:

I hired an attorney. I paid this man \$10,000 to prepare that case. And within six months, he would not talk to me. I gave him 10, rumor has it they gave him 20, or whatever, they got very friendly with him. This was my attorney...He does not talk to me... when it came down to the time for the hearings, he would not communicate with me.

JB felt her abuse and harassment was evident. She had collected volumes of evidence and letters from her employer, some of which she shared with me during our interview. Yet she never had an opportunity to present this evidence at the hearing. This experience left her convinced that the system was biased against her. She insisted that if they had actually taken the time to look at her information they could not have dismissed the case.

Money is, of course, a major factor in obtaining an attorney. Employment discrimination lawyers generally take cases on contingency, which means they will get paid only if they win the case. In some instances they calculate legal fees as they go and take the amount out of the settlement, in others they take a percentage of the settlement (or damages awarded by the court). I spoke to a number of employment lawyers, who confirmed that most Title VII cases are handled on a contingency basis because few plaintiffs can afford to pay for litigation. In this situation the firm will have to cover all the costs up front in the hopes of a large award or settlement in the end. One attorney said, "One very obvious reason low wage earners have trouble getting attorneys is that the potential reward, even with the possibility of attorney fees, is not enough to warrant the risk of losing and getting nothing." Another articulated the importance of race and class in this dynamic:

Most cases require substantial monetary loss to be economically viable for a lawyer. Some times juries will award damages, but most often is loss of income. If lost income is not considerable, attorneys may not see cases as viable. African American women are often at the bottom rung economically. In lots of employment situations harassment is tolerated, especially working class and male

dominated situations. Many of the sexual harassment claims come from white collar workers.

Another employment lawyer advised me that although Title VII allows for punitive and compensatory damages for pain and suffering, these amounts are capped and are generally only awarded in the most egregious cases. He described the considerations taken into account when deciding to accept an employment discrimination case as a “three legged stool.” The three major factors are: liability (was the employer aware of the harassment and did they have a policy in place?); damages, which are based on lost wages and; the defendant’s “deep pockets.” On the one hand, a small employer may not be able to pay a large award, on the other hand, a major corporation or bureaucracy, may have the resources to drag a case on indefinitely. As this attorney said, “At the end of the day, if any one of these factors is missing the case becomes very high risk for an attorney.” Accordingly, the income and profession of the plaintiff has a significant impact on whether an attorney will agree to take a particular case.

Some of the women who were unable to find attorneys, like JJ, were frustrated and bitter, others were resigned to their powerlessness. A worked in a clerical position in a doctors office. She was fired after complaining about the harassment and her mother insisted that she go to the State Division of Civil Rights. The state agency ruled in her favor and issued a statement advising, “complaints who wish to have their cases handled more expeditiously may do so by requesting a schedule of a hearing with representation by their own attorney.” She was clearly pleased at having a finding in her favor, and felt vindicated that an official agency asserted that she was sexually harassed. However, her ability to get proceed with the case is limited by her inability to pay for a lawyer:

First I went to an attorney. Then she told me she needed a retainer fee. I said but I

am not working, he refused to give me unemployment... The consultation was free. I only went to her once, because after that, if I were to retain her I had to give her money. She read my log and said you definitely have a case. She said but it would take around five years...I can't afford an attorney, so I have to sit and wait. I have to sit on it...believe me I would have hired one, but I don't have the money, I really don't. Because those things are paid on a retainer fee. I just don't have that kind of cash.

JJ expressed similar resignation with her inability to find an attorney. "I went to an attorney, but I couldn't afford one. I am a single parent. I have always been living tight with my income. Maybe some of it was my fault...I mishandled my money, I admit that. I spent very carelessly. I spoke to attorneys a couple of times, but then I didn't have the money to pay them to stand up for me in a court or come to meetings with me. I would have had to pay so much." When she did meet with a lawyer at Women's Rights at Work, she was advised that they would not take her case:

And then I go to [Women's Rights at Work] and this lawyer was there, and she seemed like she was enthusiastic about taking on the case...she was saying they would take on cases, and if they take the case and win it they would get a third or so. But they decided they didn't want to be bothered with the case at all. She never seen paperwork, the only thing she asked me is where I work. [I told her] then she said let me confer with the other attorneys and I will get back to you. It was about two days and she got back to me and apologized that they could not take the case because they are a small firm.

One could speculate that the small firm was inadequate to handle a case against a major federal agency. Even if the respondent has a strong case, such an employer would have a battalion of lawyers on staff and could drag the case on for years. A small firm working on contingency cannot afford to take on such cases. JJ was puzzled by the woman's final response, "Then she also made a statement, she said you are doing very good on your own. That is what she said, you are doing very well on your own....And then they sent me a certified letter to the fact, and in the letter, they said if there is anything they can do to help me, just give them a call. But I am saying this is what I

needed them to help me with and they let me go.” Perhaps the lawyer intended to be encouraging, but JJ just felt let down, how could the lawyer say they want to help and then not take the case?

D, who was unable to get a lawyer to accept her case, and felt she suffered extreme anguish and disrespect at the hands of the employer, was particularly bitter about the process. For her the legal process was all about money and power, of which she has neither:

And to make a long story short, the EEOC, certainly their legal department has better things to do than to represent me, who I totally had to quit my job and move to get this guy to leave me alone... I told the man, in America there is no justice unless you have an attorney...So as far as the federal agency goes, if you don't have money for an attorney, you are screwed.

V was the only one who seemed unfazed by her inability to retain an attorney. Perhaps, as a woman of color in a male dominated field, she has spent so much time swimming against the current, that she expects nothing less:

I don't currently have [a lawyer], well, I never actually had one; but I have talked to many. There was one particular one that I was consulting with for a while. But in the end, at some point in time, they just figured, well, there was no charge to me; but they just figured they didn't want to pursue it. I have called probably ten people or more. I've had several consultations and phone conversations.

Undaunted by the inability to retain a lawyer, she is continuing her case pro-se (without counsel).

My respondent's, having already determined that they have been victims of sexual harassment and identified it as a legal wrong, attempted to mobilize their legal rights. They are confronted at each stage in the process by a series of gatekeepers of law who control access to information and resources, as in Kafka's tale, each one more powerful than the next. The gatekeepers confronting my respondents are represented by individuals

and institutions which serve to restrict access and minimize the number of sexual harassment complaints that make it to the courts. My respondents understanding of their situation and the options available to them are informed by the social structure of the workplace as well as their interaction with employers, supervisors, and legal actors. These interviews elucidate the ways the system, which is designed to advantage those with power and resources, further demeans and diminishes those without. The complaint processes and gatekeepers of law reinforce the imbalance in power between the employer and employee.

Transformation and Legal Consciousness

Many women who are sexually harassed in the workplace never identify their experience as a legal wrong and never take any formal action against the employer or harasser. My respondents were selected particularly because they had already passed through the initial stages of the transformation process. They had identified the harassment as a legal wrong and sought to address it by filing a complaint against the employer. In selecting this sample I hope to provide some insight as to how these women think about sexual harassment and the law, and how they come to view the law as a vehicle for addressing their problem. Given the very small, non random sample in this study, I cannot claim to make any generalizations about women and sexual harassment law. However, the interviews with these women do tell us something about the process and the experience of seeking to mobilize rights in the workplace through sexual harassment law.

After examining their comments about sexual harassment and filing a complaint,

one thing is clear: my respondents are aware of a power structure which not only contributes to the prevalence of harassment, but also serves to protect and support institutions that allow harassment to continue. They are aware of a power imbalance in which their gender serves as a primary disadvantage. Like a form of rape, their sex is used against them by men who hold power over them. Ten of the twelve respondents were sexually harassed by supervisors, who had direct power over their employment situations. In the case of the other two, the harassers wielded a different form of power. For C, the prison guard who harassed her had no direct power over her but wielded fear and intimidation. Knowing the violence that prison guards are capable of contributed to C's fear of retaliation and ongoing sense of fear and anxiety as a result of the harassment. The harasser also exploited an institutional power dynamic which protected him from any serious consequences or punishment. As for V who was harassed by a co-worker on a job site, his actions threatened to undermine her credibility in the eyes of her co-workers. After working 18 years and establishing her credibility in the male dominated field of skilled labor, this was a serious infraction.

All of the respondents recognized and discussed the ways in which the social construction of gender contributed to their harassment. They describe hostile work environments in which women are degraded, sexually abused, and discriminated against, and discuss the ways in which the power structure of the workplace continues to oppress women, victimize the most powerless, and limit their access to power.

The seven women who worked in the public sector were more likely to also see an institutional abuse of power and describe an entrenched system of abuse and exploitation. In their efforts to gain some recompense for their harms, they were

confronted by a series of gatekeepers who confirm the existence of a power structure which intentionally works against them and attempts to deny them access to the legal system. It is not within the scope of this project to explain the differences between the women working in the public and private sector. However, some findings are suggestive.

None of the private sector workers were aware of internal complaint procedures. One filed a complaint with a state agency. Two were able to obtain private attorneys. The third was a L, the temp worker who complained to the temp agency and was reassigned. Perhaps, as part of a large bureaucracy, the public sector workers are more aware of the institutional power dynamic. Because they did not go through an internal complaint process, the private sector employees faced fewer gatekeepers in their effort to gain access to the law. In addition, none of them felt trapped in a system that continued to abuse them. Two chose to quit, the temp worker was reassigned and B, who was fired, was able to find a new, better paying position. They were able to escape the situation for the most part, with their dignity intact. Alternately, the public sector workers who were not fired, decided to endure the harassment rather than give up the job security and benefits of public sector employment.

All of my respondents were aware of a power imbalance both in the social attitudes about sex and gender and in the organizations in which they were employed. Although they confronted a number of gatekeepers, which served to discourage them and cast doubt on their aspirations for legal redress, most of them continued with their complaint. In some cases it was not only the harassment itself that they identified as the reason for continuing the complaint. In many cases appealing to the law was viewed as an act of resistance against this unequal distribution of power. They were motivated by a

desire not only to hold the employer and the perpetrator responsible for their actions - but also to send a message that sexual harassment should not be tolerated. In turning to the law to redress their grievance, my respondents sought to bring the power of the law to their side of the equation.

CHAPTER 5: THE PARADOX OF LAW

This chapter examines what I refer to as the “paradox of law.” The paradox of law is not simply the difference between law on the books vs. law in action, or the contradiction between an individual’s expectations of and experiences with law, although these certainly constitute some of the paradox inherent in the legal system. The paradox of law is reflected in an ideology of law and legality which hold the seeds to its own resistance. The legal system is a product of the established power structure and tends to uphold the status quo. The social and economic power inequities based on race, class, and gender are reproduced in law, and yet, law also provides an opportunity for individuals to challenge the status quo.

In the last chapter I described how the power structure and culture of the workplace, women’s economic status, family responsibilities, and interaction with legal actors informed my respondents’ view of law. I stressed the difficulties that these women have faced in attempting to use the power of the law against their employers in response to sexual harassment. Despite these difficulties, I find that it is often the ideals of law, conceptions justice and equality that inspire the plaintiffs to continue with legal action.

The paradox of law is apparent in the complexity of legal consciousness which reflects the way individuals think about and use the law. As previous research has shown, legal consciousness is not static or one-dimensional. My findings confirm that legal consciousness is complex and dynamic, changing in response to experience and reflecting the social context of each individual. In this chapter I develop a characterization of the types of legal consciousness that I identify among my respondents. Consistent with the findings of Ewick and Silbey (1998), I find that these women articulate contradictory and

conflicting view which reflect a paradox inherent in the American legal system. I identify two distinct aspects of legal consciousness prevalent in respondents' discussions of law and legality which I term the "myth of law" and "game of law."

Legal consciousness describes an individual's understanding of law and its relationship to his or her particular situation. The study of legal consciousness gives us insight into how people think about the law, its relationship to their lives and experiences, and how or why people do or do not turn to the law in certain situations. The relationship between individual citizens and law is directly related to the ability of citizens to challenge the power structure through mobilization of law and the significance and impact of legal mobilization for social change.

The study of legal consciousness is based on the understanding that law is more than a set of rules and procedures; law is also part of our social and cultural institutions. The law has been described as an ideology with hegemonic characteristics. The power of law depends in part on its ability to enforce compliance through coercion and threat of force. However, as an ideology, law relies primarily on citizens acknowledging its legitimacy, or inevitability, rather than force. As a form of hegemony law has the capacity to establish and enforce social structures, relationships and the categories by which we interpret the world around us. Merry (1990) describes the cultural domination exercised by law:

Although domination usually means control exercised by force, it can also take place in a gentler sense as control over the way people think about themselves, their problems, and the world. Although not violent, this form of domination is nevertheless powerful: it encompasses the ability to determine the thinkable and the unthinkable...over ways of talking and acting (p. 9).

As a form of hegemony the law relies upon both legitimacy and force. The ideology of law, which is based on concepts of justice and equal rights, must appeal to subordinate groups in order to maintain legitimacy and compliance. The hegemonic power of law depends in part on an ideology which establishes the ability of citizens to engage the law in order to challenge the status quo:

Law, as an ideological weapon, has two edges: it is a source of domination and at the same time, contains the possibilities to challenge that domination. It is not a part of the hegemonic ideology in the simple sense of a set of beliefs which induce subordinate groups to go along. Instead, it is an ideology which becomes part of the struggle over control - and it is the language in which this struggle takes place and in which power is contested. Thus, law constructs power and provides a way to challenge that construction (Id p. 8).

In order to retain its legitimacy law must be responsive to individual experiences and constructions of legality. The ability of law to construct power relations and also provide a way to challenge the established power structure is a crucial component of the paradox of law.

Legal Consciousness Revisited

Studying legal consciousness provides an opportunity to increase our understanding of the way law informs social and cultural understandings, relationships and action. "Although the law provides authoritative definitions of problems, its domination is neither complete nor static" (Id p. 10-11). Law's formulations and constructions of problems and relationships are not unqualified. Legal consciousness is formulated through experience with the legal system as well as the frame of reference each individual brings to a given situation. Legal concepts, language and ideals represent only part of the frame of reference that people bring to bear on a particular situation.

Consciousness develops and evolves through individual experiences and changes as a result of those experiences.

This reciprocal and constantly shifting relationship between legal norms and attitudes about law and legality which characterizes citizens interaction with the legal system is instrumental in forming legal consciousness. Studies of legal consciousness must take into account individual action, context and experience as well as structural and institutional constraints. According to Ewick and Silbey (1998), legal consciousness participates in the construction of legality: “Legal consciousness is produced and revealed in what people do as well as what they say... We understand consciousness to be formed within and changed by social action” (p. 46). Legal consciousness partakes of people’s lives and experiences, frames of reference as well as legal knowledge and concepts.

Ewick and Silbey describe a complex dynamic in their study of legal consciousness. Based on the stories told by their respondents they identify three types, or categories of legal consciousness, which they term “before the law,” “with the law,” and “against the law. They assert that these forms of legal consciousness do not exist autonomously and independent of one another; rather, they find that individuals may simultaneously hold conflicting views of law and legality. In the course of a single conversation, respondents would articulate different aspects of more than one type of legal consciousness.

The first type of legal consciousness described by Ewick and Silbey is “before the law.” Respondents who place themselves “before the law” speak of law as reified and standing apart from the experiences of individual citizens and everyday life. They refer to

a legal system which is distant from the biases inherent in everyday social interactions. This form of legal consciousness represents of a notion of law which is fair and just, and emphasizes legal institutions rather than individuals. People who describe a reified legality frequently refer to the law as impartial and objective. “In a reified law, people locate legality in rules and regulations. These rules seem to produce effects independently of human action and afford legal decision makers little choice in interpreting or acting upon matters before them” (Id p. 88).

Before the law represents the grand ideals of law unsullied by human biases and imperfections. It recalls the claim that America is a nation ruled by laws, rather than men. Before the law can be compared to legal formalism. “American legal ideology describes the law as neutral (justice is blind) and fair (the scales are balanced)...Liberal legal ideology claims for legality a timelessness, as the past (in the form of precedent) is preserved and continually enacted in the present...legality transcends the here and now, the specific who and what, to instruct and guide through the generations”(Id p.106). This type of legal consciousness reproduces the facade that legal institutions present to the public and it accounts for the rarified and specialized language of law.

While “before the law” can be compared to legal formalism, “with the law” calls to mind the legal realists perspective. Respondents who articulate this vision of law understand law as process of engagement. They may refer to law as something that can be played out like a game. And they recognize that, as in a game, the players may have different levels of skill and experience which can have significant consequences for the outcome. This type of legal consciousness takes into account the interactive, social aspect of law. Law is understood to be implemented and acted up on by individuals and society,

and can influence social power dynamics and relationships:

When people spoke of using the law, it was always in relation to others; there was always an opponent, another person or organization, imagined or real, whose interests and actions defined the content and limits of their opposition. In this construction legality is inextricably embedded in the web of social relationships, out of which interests and disputes emerge...Legality emerges out of and continually shapes those roles and relationships (Id p.134).

These respondents recognize that there are costs associated with using the law, and these costs may be more or less burdensome to different players. Accordingly, one must make strategic judgements about the use of law.

The final type of legal consciousness described by Ewick and Silbey, “Against the Law,” focuses on the authority of law and reflects a recognition by individuals of themselves relatively powerless against a powerful institution. Respondents articulating this perspective tell stories of law as a powerful system in which they are trapped and against which they must struggle. In this conception law is viewed as untrustworthy and is to be avoided whenever possible. “In contrast to both the reified and game like versions of legality, when people describe themselves ‘against the law,’ legality is characterized as something to be avoided. Because it is a product of arbitrary power, legality is seen as capricious and thus dangerous to invoke. Rather than conditionally appropriate or useful, in this form of consciousness, legality is condemned” (Id p. 192).

These conceptions of legal consciousness are not ascribed to individuals in a unitary or consistent manner, rather, at different times and in different contexts, respondents may articulate more than one ideology of law. My own research elicited a similarly complex combination of attitudes and reflections about law, which are comparable, with some significant variations, to the findings of Ewick and Silbey.

The Myth of Law

I suggest that an ideology of law which I describe as the “myth of law,” plays a significant role in the decision of my respondents to file a complaint in response to sexual harassment. There is a powerful lure of the ideals of law and a sense of entitlement that the law provides. Like the plaintiff’s interviewed by Merry, my respondents, “...are not naive about the extent of social and economic inequality within American society or about their relatively powerless position. Despite their recognition of their unequal power, the nevertheless think they are entitled to the help of the court” (p. 2).

A major component of the myth of law is the symbolic power of the law. The myth of law refers to legal ideals and aspirations; it reflects an idealized view of law which truly exists only on the books (and possibly in the rarified chambers of the highest courts in the land, where discussions and arguments focus on legal principles without much attention to the individual participants in the case, or those who are responsible for implementing the decisions).

All of the respondents in this study were aware of laws against sexual harassment. The myth of law is expressed in the idea that the existence of these laws ought to make a difference. In many cases respondents refer to the law against sexual harassment and suggest that law ought to have the power to make a difference. My respondents sense the potential power of law and believe that they ought to be able to bring the power of law to bear on their situation. The symbolic power of law represents a is a key component of legal consciousness of most of the women I interviewed. The idea that law matters, or should matter, is inculcated into us from a young age. Television and popular culture’s love-hate relationship with lawyers, nevertheless conveys a sense of the power of law.

After being assured that her experience fell into the legal definition of sexual harassment, B felt the power of the law was behind her:

I went to meet with [a lawyer], I told them my story... I have a really strong case, and they said I should pursue it...I thought that the law would be a lot more on my side when I went to meet with the lawyer. I thought it would be a lot easier than it has been. I have a really good law firm. They are one of the best in the state, they have a whole department. I thought it is going to be cut and dry. They are going to see this letterhead, first of all, and they are going to shake in their boots because it is a big firm.

B was certain that being represented by a large, prestigious firm meant that the power of the law would be on her side, "I expected sharks, going in, laying it on the line, kind of like you see on television. I watch Law and Order all the time on television. I thought they would go in and lay it on the line."

Often respondents articulated the view that the existence of laws against sexual harassment validated their experience, and that mobilizing the law would require the employer to address the problem. When asked what she expected from filing a complaint, S responded, "Well, I thought they were going to do the right thing. By that I mean all these laws they have about sexual harassment, hostile work environment. I thought they were going to do something about it. If not correct it with the person's behavior, then either move him out or put me somewhere else where I can work and not be around that person." In framing their experience in legal terms, respondents refer to the symbolic power of law and the knowledge that the law is on their side, even if implementation of the law is problematic.

For women whose experiences have frequently been minimized or dismissed, there is a major impact in the symbolic power of the law to declare that they have been wronged. A describes the elation she felt when the external investigation found in her

favor. She felt that they had validated her experience, but she also expresses disappointment in realizing that symbolic power of law does not necessarily translate into any actual gain. “I got a letter two years ago that they said they ruled in my favor... They ruled that I sexually harassed... I was jumping for joy, I figured oh gee, maybe it’s coming up... I got this letter, now that was two months ago. So who knows, according to the letter, they are back logged. I can’t afford an attorney, so I have to sit and wait again... So here I am sitting again waiting for my civil rights.”

I suggest that it is this underlying belief in the myth of law and the power of rights that encourages these women to think of legal mobilization as an act of resistance.

Without a clear understanding of the legal process or implications of filing a complaint, there is nevertheless, a clear intent to wield the power of law on the side of right. R states:

What brought me to that point [filing a lawsuit] was the fact that it is so pervasive and the fact that it constantly goes on in such a manner where the people who are guilty of this, they actually do it because they can and will ultimately get away with it. There is no one to check them, there is nothing that can stop them. I feel that it would send a message, even in a small way, to have them, first of all - letting them know that this is wrong, this is illegal and this does have consequences.

The law provides an opportunity to speak out against the injustice and harms done to women. V suggests that although she was unclear of the legal implications, she was certain that filing a complaint was the appropriate thing to do. “So I wasn’t necessarily thinking about what I wanted to have happen. I just knew it was wrong and I just couldn’t act like it didn’t happen... But the main thing is to make it a point that it shouldn’t happen and it can’t be condoned and it can’t be allowed to happen without action taken.”

The myth of law, which relies on the symbolic power of law and reflects ideals of equality and justice, exists alongside the recognition that the individuals and institutions

which make up the legal system are part of the very power structure which condones and contributes to sexual harassment. Whereas the characterization by Ewick and Silbey of “before the law” refers to a legal system which is objective and stands apart from everyday life and social interaction, my respondents tend to see legal institutions as a part of the larger power structure which is complicit in the abuse and discrimination against women. In this view, the legal ideals of justice and equality cannot be implemented in human social interaction without being influenced by the problems and inequalities inherent in our society; unequal distribution of power, institutionalized inequality, racial and sexual discrimination.

My respondents articulate a recognition of the symbolic power of law and the importance of legal ideals, while simultaneously expressing a distrust or cynicism about the institutions responsible for implementing them. D says, “There are three quarters of the globe, do you know it is ordained by their beliefs, their religion, their philosophy, that men can do whatever they want. But guess what? It is not in America. But nobody calls a spade a spade.” She asserts the fact that U.S. laws and policies do not condone the type of sexual discrimination and gender stratification that are part of official doctrine in some countries. Here in America we have a system of laws that dictate that women should be treated equally, but “nobody calls a spade a spade.” In other words, we fool ourselves into believing that the equality dictated by our laws exists in our society and few individuals are willing to confront the vast disparity between the legal ideals of equality and the everyday experience of most women in this country.

JB expresses the ideals articulated in the myth of law along with a profound disappointment in the response of legal actors and institutions to the problem, which is in

dramatic contrast to law's promise of equal opportunity and equal treatment in the workplace, "...people are saying we need laws. But we have laws. We just need people who are not afraid of using the laws that we have...The [state] has laws, sexual harassment laws, but you know where they are? On the books, and that is where they are going to stay." According to JB the laws exist, but they remain out of the reach of most people. There is an aspirational quality to her comment which suggests that things might improve if only we could figure out how to access the laws we have and use them for the people they were intended to help.

She expresses an idea which is prevalent in many of my respondents' discussion of law. They retain a notion of legal ideals as important, but understand that law cannot remain separate from human social interaction. The law fails because our legal ideals are undermined by the institutions which have been created to implement laws. These women believe in the importance of the fact that laws exist to address the problem of sexual harassment. However, they only work for the select few who can get past the gatekeepers. Most victims of harassment find themselves struggling in a legal system in which they have little power or control. Yet, without a belief in the ideals of law and the aspirational quality of law, the mobilization of rights against a formidable patriarchal power structure would probably not occur.

The Game of Law

The complex view of law apparent among my respondents indicates an understanding of the limitations of the myth of law and a recognition of various aspects of the legal process which seem to undermine the ideals represented by the myth of law.

I characterize the second type of legal consciousness that I identify among my respondents as the “game of law.” Ewick and Silbey describe a type of legal consciousness they refer to as “with the law,” in which law is understood as process of engagement and can be played out like a game. Respondents who articulate this vision of law understand law as a type of game, in which the rules are established, but individual actors come to the game with different sets of experiences and more or less power to manipulate the rules of the game. “They understand that there are costs associated with using the law...our respondents also acknowledge the significant consequences of players’ different levels of skill and experience. In other words legality comes with costs that are differentially burdensome, and thus legality is differentially available” (p. 132).

A similar notion of law as a game is a predominant theme in the interviews I conducted. My respondents recognize that there are costs associated with appealing to law and make strategic judgements about the use of law. They understand that the players do not all come to the game equally situated and that the rules of the game are not equally understood by everyone. Lawyers play a crucial role in the game of law because they understand the rules and come with the knowledge, skill and experience to play the game.

If the myth of law reflects the ideals associated with law, the game of law reflects the ways that human interaction and the inequalities in our social and economic system are replicated in the legal process. How the legal process plays out depends upon the resources each player brings to the game and the extent to which the players have knowledge and understanding of how to manipulate the rules of the game and the language of law. The women in my study believe that the law ought to be able to bring some power to their side of the relationship with the employer, but they are also aware

that other players, especially the employers, have greater power and resources to manipulate the rules and the players to their advantage.

The costs associated with playing the game of law are not entirely financial, although the expense can be a major stumbling block to gaining access to a legal solution. For D, the inability to pay a lawyer meant that she was excluded from the system and did not even have a chance to play the game:

The college, as innocent as they proclaim to be, have hired three different sets of attorneys. I do not have the money for the first attorney. So if they are so innocent, why are they shelling out all this money? So you see there is no winning for someone like me, because I don't have \$20,000 to slap on a lawyers desk and say I want this to go to court. I may as well slap it at some gambling table. It is like a gamble.

For D, in order to access the game of law, you must be able to afford the price of admission.

The high costs of appealing to the law are often reflected in the time spent and the personal discomfort that invoking the legal process involves. Although she feels confident about her case and is optimistic about the outcome, R reports, "It is very time consuming and stressful, and it invades your life constantly until it is over. And there is always the threat of you losing." Both D and R articulate another aspect of the game of law, no matter how well you play, there is always the possibility of losing. Although they believe there are rules governing the process, they understand that the outcome is always uncertain.

Engaging the legal process can be a debilitating experience. Fitzgerald (2004) points out that despite the existence of evidentiary rules which are intended protect women who file complaints from additional harassment and abuse, most of these rules only come into play in the courtroom:

Few plaintiffs can afford the costs of protracted litigation, and attorneys are often unwilling to roll the dice financially on their behalf. Critically, much of this process occurs in discovery and subsequent judicial decisions concerning what testimony is admissible. Rules limiting a admissibility at trial are little comfort to a woman facing three male attorneys and the accused harasser, all poring over her gynecological records during deposition (p. 97).

B, who seems to have successfully navigated the system and was able to retain a prestigious law firm, nonetheless describes the pain she had to endure by continuing with the lawsuit. “The legal part of this has just been a nightmare as sexual harassment... We go through these big huge things, [depositions] word for word, what happened in each incident. Every time that I leave there I feel ill. I have to keep bringing it back up... It was just really horrible to go through it. But we go in there and I had to tell verbatim all over again, every single thing.” For those women who have managed to get past the gatekeepers and have been granted access to the law, there are significant emotional costs of playing the game. P describes her lawsuit as a “very burdensome and humiliating experience... It was a terrible, awful battle, and opposing side did everything to try to demean me [including] a lot of delving into my personal life, even getting medical records and trying to indicate that my marriage was in trouble.” Eventually she agreed to settle, because the emotional cost of litigation became too much for her and her family to bear.

One of the most important aspects of the game is who gets to play; only certain people are able to play the game. In the last chapter I discussed the various gatekeepers who limit access to law. The legal system and the complaint process seem designed to discourage victims of harassment from filing complaints. Of the twelve participants in this study, only two had the financial resources to hire a lawyer. Two were able to find attorneys willing to take their case on contingency, and one decided to file without an

attorney. Two of the respondents, unable to retain attorneys, filed with the EEOC and obtained “right to sue” letters, which means that enough evidence of harassment was found for the case to move forward, but they remain in legal limbo waiting for the agency to proceed with their case. One filed with a state agency and has seen no movement on her case. Three others had their claims dismissed by EEO officers who advised that there was not enough evidence to warrant further investigation. Finally, the temp worker was told she has no standing to sue.

The question of access is a pivotal one. I found that the ability to get into the game has profound affect on the legal consciousness of my respondents. Certain individuals have been denied the opportunity to play the game, they have been kept out by the gatekeepers of the law. These women who have been denied access are confronted with a system of powerful institutions which reinforce one another and offer no support for those who would challenge the status quo. The women who are shut out by the gatekeepers tend to see the “myth of law” as just that, a myth; the ideals of justice and equality are beyond the reach of ordinary citizens and have no significance for their everyday lives. They see the law as a constituent part of the institutional patriarchy which contributes to and defends the harassment. S reports:

It seemed like everywhere I went, either internally with the police department or externally with other agencies, I just got lost among the pile of people. That is the way it has been and still is to this day. Nothing has really come out of it... I think it is disgusting that they can do all these things to me and just not ever have it addressed... The union was supposed to challenge the termination and put in a request to have me reinstated. That never happened. To this day I rarely hear from the union... I feel I've been abused and I've been a victim, and I still am being victimized. I went and filed a claim with the state, I am just a number there. I don't hear from that case worker. And any follow up information I sent to her just gets collected in my file.

The women who have been denied access to the law express bitterness about the

legal system. Their anger and frustration is targeted at the the institutions and individuals responsible for administering the law, who perpetuate a system that contradicts legal goals and ideals. Yet they continue to hold in their consciousness the underlying ideals of the myth of law. Their legal consciousness suggests an idea of law which remains separate from the institutions and processes designed to implement the laws. It is the institutional power structure, rather than the law itself, for which these women express their disillusionment. D states, "In America there is no justice unless you have an attorney... if you don't have money for an attorney, you are screwed. First by your boss, and then by the system." Implied in this statement is the notion that justice is attainable, but only for those who have the resources to get into the game.

JB sees the law being manipulated by the men who dominate the power structure of the workplace, and who use it to serve their own ends:

They know how to get around it... The law says they must hire you, the law didn't say they must keep you. The day you walked in there, they already figured out how they are going to get rid of you if you don't go along with the program....It's a man's world. So unless you go along with the program, if you don't go along they will do whatever they can to get rid of you. Because they have to show you they are in charge.

According to JB the law is controlled by corrupt forces; "Whatever they did, it was legal. They somehow know how to make it legal. Nobody complains about what goes on there. You can complain but you are not going to work there."

Access and the ability to wield the power of the law are significant factors in my respondents' legal consciousness. C describes a process which puts women at risk and serves to discourage them from coming forward to file complaints:

The victim always gets the bad end. The criminal can do whatever he wants. And they wonder why I didn't file a complaint, like I am bad to not file a complaint. Now, if I knew, maybe what you are trying to do, if something can happen with

this where a woman doesn't have to worry about filling out a complaint and the victim doesn't get raked through the coals, and that happens more often than not, that would be fine.

C's comments identify the failures in the legal process, but there is an aspirational quality to her statement; she suggests that if the system were allowed to work and women were free to file complaints without fear of retaliation, perhaps the law could do its job. A expresses resignation about her inability to hire a lawyer to move her case forward. But she continues to hope that the law will eventually come to her aid, "I really have nothing to lose. I would like to see it settled, one way or another. But like I said, I didn't do anything, I am not the guilty party here, I am the victim. So he is the one that has it over his head, not me. So I just have to sit and wait it out, however long it takes."

Whether they are able to become players in the game and have the law working on their side, or they have been kept out of the legal system by the gatekeepers seems to have a profound influence on how these women perceive the law and legal system. Those who were able to get through the gatekeepers and mobilize the legal system on their behalf are able to see law as an opportunity for resistance against the institutional power structure. Even those who are able to get past the gatekeepers and gain access to the legal system are aware of the power imbalance among the players. They recognize that everyone does not enter the game on equal footing; they must contend with a system that is inherently unequal, and that players enter the game with different levels of skills and resources. Invariably, a significant power imbalance exists between the plaintiff and the employer. Having the law on your side may have symbolic power, but once the game of law begins, the players will use whatever power they have to their advantage, and the outcome often has less to do with right and wrong than with the way the game is played.

The Rules of the Game

The legal consciousness that I have termed game of law reflects an understanding that the legal process is played out like a game. Not only do the players come to the game with different levels of power and resources, they also engage the law with different levels of experience and knowledge about the rules of the game. The rules and procedures, like the language of law are not designed to be accessible to the average citizen. Lawyers are the gatekeepers who understand legal language and procedures and know how to use the system to their client's advantage. Newcomers to the game of law are often unprepared for the machinations of the legal system. The myth of law encourages these women to believe that the goals of the legal system are to find the truth, provide justice, and right wrongs. However, even respondents who have engaged lawyers find the rules and machinations of the legal process beyond their understanding and ability to influence. Having navigated through the gatekeepers, these respondents enter the legal process to find that truth, justice and fair play do not reflect the actual rules of engagement.

B filed her case with confidence knowing that she had a prominent firm with experienced lawyers on her side, but she finds the process incomprehensible, "I don't even understand most of it. To me it makes no sense, the things they do. Our legal system is ridiculous, but we already knew that before my case." She expresses outrage over the actions of the defendant and the inability of the law to come to her defense. Her former employer continues to drag out the process. The original trial date set for June was postponed at the request of the defendant, "So this last time they were supposed to set it

for August, and now his lawyer told the court he has trials during August...So it has been pushed off now 'til October, the trial date. And who knows, it could be anything again come October. It is just ridiculous that they can just continue delaying.” Even though she was originally advised by her lawyers that she had a strong case, she feels that the employers have manipulated the legal system to their advantage:

They've tried to play all these games. When I first brought the suit against them, they tried to sue me for defamation of character, so we had to get that thrown out. And with the deposition, she made up all these outrageous lies about me. I was like, you are under oath - these are blatant lies. It is not fair, I am not lying about them...Everything that has happened has been in their favor. None of it has been in my favor yet. The court, every time we go for a motion or something, it is always in their favor, never in my favor.

Similarly R, who managed to find an attorney to represent her against a large city agency, expresses surprise at the ways in which the employer has manipulated the process:

[The employer] is this huge organization with many cogs in the wheel, a very self-sufficient organization. For them to actually independently hire an attorney to defend this case shows in itself that there is something wrong, with the amount of attorneys that they have sitting at [the headquarters]. None of them were able to actually defend this man, so they had to hire a law firm out of Canada to sort of find some defense. And the tactics they use, the line that they used, I am telling you, John Gotti's attorney could have benefitted from their tactics. Johnny Cochran could benefit from their tactics. It is so outrageous the dirt that they are trying to dig up against me, it is laughable.

Merry found that women, who are among the most powerless groups in our society (especially women of color and poor women) are more likely appeal to the power of law because they are relatively powerless in most of their relationships. However, they learn that the law, while sometimes providing the power to challenge the status quo, also exerts a force of its own. Citizens who look to law to empower them in conflict situations often find that their conflicts are restructured and redefined by legal norms, language and

actors. Translating their harms and experiences into the language of law often results in redefining their experiences. In the process individuals lose control of the situation as their interpretation of events are superseded by those of the legal system:

There is both power and danger in the use of the courts. There is power in wielding a potent weapon, one which is symbolically powerful and can have severe consequences. But there is danger of losing control of the weapon...After submitting their problems to the courts for help, plaintiffs must then struggle to keep control of their problems as the courts reformulate and reinterpret these problems's meaning and consequences...women were particularly likely to find their problems reinterpreted as issues of character and emotion rather than of legal rights (p. 3).

Like opening Pandora's box, once they appeal to the law, women often find they are likely to lose control of the situation. Although it is the lawyer's job to translate respondents complaints into legal language, some of the respondents express disillusionment at the lack of communication with the lawyers they have retained to represent them. W articulates her discomfort with the loss of control she feels when she finally finds a lawyer to work on her case:

The process with the lawyers has been a little bit disconcerting to me at this point. I don't feel that they've really communicated with me very much, not only about the process but what I went through. I gave them all of the writing that I had, the letters to EEO, the formal complaint, whatever I had. They've asked me various questions as far as who witnessed what, and I've given them a lot on that. But they've never really sat down with me and asked what my goals were and how that impacted on it.... I am just feeling uncomfortable at this point about this lack of dialogue. When they filed with the EEOC they took months working on it, but the complaint was half a page. The facts weren't there...Then when they put together the more extensive version of the complaint, there were errors in that also...So that is a little surprising to me, and is making me a little nervous at this point.

For many respondents the myth of law ideology collides with the realities of the legal process. These women come to the law with the belief that facts, documentation and

evidence will prove the rightness of their claim. Many of these respondents assiduously recorded examples of harassment, believing that such documentation would be an important factor in any lawsuit. D filed a complaint with the EEO office at her college, “I supplied them with over 300 written correspondences referring to my vagina, calling it ‘love,’ calling me everything from a lover, mistress, and wife.” JJ provided the EEO investigator with documentation of the abuse she endured:

I wrote up everything that was happening to me...[the EEO officer] asked me did I give her paperwork on what was happening to me. I said I gave you the memo that I filed with my employer. It is a ten page memo, all the things that have happened to me. Not all, but most of the things that have happened to me, a majority of the things and treatments that I’ve had. It was a ten page memo...And I keep files for everything that happened to me...Because since I couldn’t afford to get help, I just kept a record of what was happening so that maybe one day I might be able to find someone who would help me.

In trying to play by the rules of the game, respondents often prepare themselves as if for a trial, gathering documentation, facts, information, and witnesses. However, most never have the opportunity to enter a courtroom where such evidence might become relevant. S expresses her discouragement that all the evidence she has accumulated seems to count for nothing, since she can’t find a lawyer willing to take her case:

I walked around with tape recorders. I have so much things taped of the nasty things they said to me. I documented everything that happened daily. I made copies of how they lied on the reports and how they changed it. I have all of those things. It can’t be a matter of that. I don’t know what it is, but I tried to get as much proof as I could. I said I know it is going to be really hard to explain to someone that this really happened. And maybe I am not articulate enough to get it across where they can really hear it or understand it, against the police department. You know, who has this reputation. It is very frustrating.

Although JB was able to get an administrative hearing on her claim, and was prepared to provide the judge with ample documentation, she was outraged that her case was

dismissed without providing her an opportunity to present her evidence:

I had it on paper. I wanted to go to court to show the judge. She [the EEO officer for the employer] wouldn't let me in the trial, she didn't want to see any documents I had...I wanted to explain to the judge. I wanted to show him my telephone records from the so called superintendent who was driving me nuts..Nobody will sit down and look at it...I got a letter saying the appeal was denied...The judge could not have read it. I had witnesses...I had witnesses and letters, all the awards and everything I had, up until that point that day [that she was fired]. I don't know what happened.

For the few women who get past the gatekeepers and have the opportunity to engage the legal system, they soon find that the most of the game of law takes place outside of a courtroom and that the language of the law is not based on truth, facts, or evidence, but rather on negotiations and monetary settlements. A was advised by an employee at the state agency she contacted that claiming damages is not simply about regaining what was lost, but using the legal system to get the best deal possible:

All I really wanted was, as a matter of fact, when I spoke to the woman at civil rights, I said, I am not looking to make money out of this. All I want is my six months that I lost. She said you want that and you want pain and suffering....Yes, she told me, you want that and you want what he put you through. It wasn't pain and suffering, she called it... I don't know, she said something, but she told me what I should be suing for. And really basically all I wanted was my six months that I couldn't collect unemployment or nothing.

B learned through her attorney that the ultimate goal of the lawsuit is not a have her day in court or to obtain justice, but rather, to get a good settlement:

She [the lawyer] said I need to know if they come with an offer, I need to know what you are willing to settle for. And she is always like settle means you are settling, you are not really getting what you want....She said most sexual harassment cases don't go to trial, they'll wait to the day we are in the court room and then they'll say we'll settle. So I am hoping for that. I don't want to have to go through sitting on the stand and getting ripped apart from their lawyer.

V, who met with a number of lawyers to learn more about the legal process and how to proceed with her case, describes learning to play the game of negotiation against the

employer's lawyer:

I just had maybe two weeks ago a meeting with the company's lawyer and the judge at the courthouse. The lawyer was threatening, he is going to move to have the case thrown out and this and that. They offered me \$900. I said no. The next thing he's telling me is that if I don't settle this now for this amount of money, he is going to be at the point where he's put too much time and work into it and they won't be willing to settle. I told him I am not dropping anything or settling anything...I didn't know what all I should ask for or whatever, but I just told them, well, I thought I had to give them some number. So I just told them \$20,000. I am not sure why I said that number, but basically I wanted to have a number that would not be just like inconsequential to them. Because apparently the only thing people will pay attention to is when they lose money somehow. That really is the only reason I put a number figure on it.

The ideology of the myth of law continues to play a significant role in my respondents' legal consciousness, even as they learn that it does not reflect the true nature of the American legal system. Although four of the twelve respondents to this study have come to believe that the legal system cannot provide a solution to their problem, and four remain in legal limbo waiting to see if the EEOC or state agency will proceed with their case, or an attorney can be found to represent them, many of them retain a belief in the importance of appealing to the law.

I find that many of my respondents, in describing why they chose to file a complaint and continue to pursue a legal resolution despite numerous setbacks, articulate an ideology of resistance. For them, the appeal to the law is not only an attempt to gain recognition of the wrong done to them, filing a legal claim is also viewed as an act of defiance - a way to fight back, show that they are not simply victims. S states, "I can't really expect another woman to jeopardize everything for me, just because she is trying to do the right thing. But I chose to do so because I was tired of it. It got to the point where they were telling me every day that they were going to fire me anyway, so why wouldn't I go and make a complaint and try to get some help?" When asked what she expected to gain

from filing a complaint she responded, “Really and truthfully, some part of my dignity again. I think it’s disgusting that they can do all these things to me and not have it addressed. I want it addressed.”

Even among those respondents who were able to gain access to the legal system and learned that the system is not designed to dispense justice, but rather to encourage a monetary settlement, the principal goal of filing a complaint is not financial. According to R:

I think my ultimate goal is not monetary. What I went through, I told his lawyers and told the world, you can't put a price on it. A woman's body, a woman's self-esteem, a woman's humanity is priceless. There are not enough dollars equal to that. I mean the sky is the limit. If you are doing this for money, I mean that is senseless to me. But if you are doing this because you can help someone not go through the torture, not to through the hell and the concentration-camp like conditions, it is all worth it. It is worth it.

The symbolic power of the myth of law encourages women to file complaints, even when they realize that appeal to the law is problematic. For many of these women, the appeal to law is not first and foremost about resolution or recompense, but an act of resistance. Their ultimate goal is not monetary, but rather to send a message, to challenge the powers that be and stand up against the abuse and exploitation of working women.

CHAPTER 6: CHASING JUSTICE, CHALLENGING POWER

As Tocqueville famously noted, law is an integral component of American political and social institutions. The idea of law as the protector of marginalized and disenfranchised members of society is largely a product of the 20th century. The legal rights activism which began with the NAACP's strategy against segregated education helped to establish a modern notion of law as a tool for social change. This notion of using law to improve the situations of disadvantaged and underprivileged Americans came into prominence during the Warren Court era. Merry (1990) points out, "During the twentieth century, the law has gradually taken on a new face as the protector of the weak and vulnerable, as a tool for achieving social justice, and as a weapon against big business and corporate power" (p. 178). The idea of law as an agent of social change, in which power of the law can be used to protect the powerless and disenfranchised, has become firmly established in the contemporary American psyche. Like the ideas of freedom and democracy, the myth of law ideology persist as part of the American dream of life, liberty and the pursuit of happiness.

Law has been identified as an ideology with hegemonic characteristics; the legal system establishes and defends certain power relationships and also provides opportunities to challenge the existing power structure. In attempting to gauge the capacity of law to effect social change, we must strive to understand the way legal concepts inform social life and how and why people invoke legal language, authority and procedures. Studying legal consciousness provides insight into the ways law operates as a form of cultural domination and the ways individuals resist the domination of law and seek out the seeds of resistance embedded in the legal system. This research project

expands our understanding of how ideas of law and legality inform social attitudes and behavior by examining legal consciousness from a feminist perspective.

This project was designed to bridge the gap between feminist scholarship and legal consciousness research by focusing on women's experience with the legal system in response to sexual harassment. Feminist jurisprudence has shown how law, conceived and established from a male perspective, enforces the social constructions of race, gender and sexuality. This feminist analysis offers a framework for understanding how the institutional and social structures of patriarchy underlie the legal process.

My research contributes a more nuanced understanding of legal consciousness by incorporating a feminist analysis which highlights the ways in which power in American law is suffused with understandings of gender and sexuality. This project examines how social and legal constructions of gender and sexuality inform perceptions of law and interaction with the legal system. Feminist analysis of sexual harassment law asserts that sexism, sexual oppression and patriarchy are so ingrained in our laws and legal system that many women are unable or unlikely to benefit from an appeal to the law. However, sexual harassment law creates an opportunity for women to challenge the patriarchal power structure.

Legal consciousness research indicates that how people think about and use law is informed by life experience as well as interaction with the legal system. Ewick and Silbey (1998) note, "Because law is both an embedded and an emergent feature of social life, it collaborates with other social structures...to infuse meaning and constrain social action" (p. 22). My project illustrates the experiences of women who seek to challenge the authority and power structure by appealing to the law, and how they come to

understand the ways in which gender and power are institutionalized in the workplace and the legal system.

Feminist Jurisprudence and Critical Race Theory have brought attention to the ways classification and identity, so useful in the logic of the law, serve to fracture individual lives and experiences. Feminist legal scholars and activists have challenged the legal system to address the disconnect between the law and women's lives. My research highlights the critical disconnect between the law and the reality of women's lives, and exposes how existing institutional structures subordinate women and marginalize their experiences.

This project, based on in-depth, semi-structured interviews with a dozen women from a variety of racial, socio-economic backgrounds and family situations, was designed to explore the relationship between individual life experience and legal consciousness. The small scale, intensive nature of this study, while unable to provide evidence for making broad generalizations, represents an exceptional opportunity for examining the ways in which cultural context, individual identity and life experience come together at the intersection of legal consciousness and legal action. Through these interviews, the experiences of my respondents show how the social structures of gender, sexuality and patriarchy are implicated in their conceptions of law and legality.

The stories of these individual women and their experience with law in response to sexual harassment in the workplace, illustrate the power of law to constrain individual action. At some level these stories serve to support feminist jurisprudence arguments about the limits of the legal system and sexual harassment law to address the problem of sexual harassment as it is experienced in everyday life. Their stories emphasize how

patriarchy establishes and maintains gender inequality in the social and economic structures of the workplace and the legal system. However, they also indicate how individuals will resist the hegemonic power of the law and seek to use the law to empower themselves, despite an awareness of the challenges and limitations of law. Among my respondents I find a strong sense of legal mobilization as an act of resistance. My research suggests that the symbolic power of the law, what I term the “myth of law” plays a significant role in the willingness of women to call upon the law in cases of sexual harassment. For most of the respondents in this study, the act of resistance in using the law against the established power structure was as important as any outcomes that legal system might provide.

My respondents hold complex and, at times contradictory, ideas of legal consciousness. They are keenly aware that the law is part of the institutional power structure that contributes to their powerlessness. Yet, it is that very sense of powerlessness in the face of such institutionalized oppression and discrimination that encourages them to call upon the law in the name of the ideals that the law represents: truth, justice and equal protection. This paradox evident in the legal consciousness of my respondents represents how the ideals of equality, justice and empowerment, coexist with the realization that the law often does not establish justice, treat individuals equally, or empower marginalized persons. Ewick and Silbey (1999) assert that these contradictory ideas of law are not a weakness, but rather a source of strength for law’s hegemonic power:

... the apparent oppositions and contradictions - the so called gap - might actually operate ideologically to define and sustain legality as a durable and powerful institution...The internal contradictions, oppositions, and gaps are not weaknesses in the ideological cloth. On the contrary, an ideology is sustainable only through

such internal contradictions insofar as they become the basis for the invocations, reworkings, applications, and transpositions through which ideologies are enacted in everyday life (p. 1036-1037).

Examining the apparent contradictions and complications in the legal consciousness of those who seek to use the law's power to resist the institutionalized power structure is critical to understanding the experience of citizens in relation to the law and the potential of the power of law to create social change.

Feminist Legal Consciousness

The existing literature indicates that legal consciousness changes with personal experience as individuals interact with legal actors, legal language and procedures. As a result of their experience with sexual harassment, the women in this study all recognize the ubiquitous and institutionalized nature of sexism in the workplace and the significance of gendered power relationships that allow sexual harassment to continue. The experience of harassment which causes these women to appeal to the law, brings with it a sense of the imposing power of sexual abuse and discrimination. It is within this frame of gendered power in the workplace that my respondents perceive their options and attempt to engage the law on their behalf. My respondents' perceptions of, and interaction with, legal actors and institutions occur within this context of gender discrimination and a recognition of the inherent power disparities of the workplace, as such it informs their experience with the legal system and their view of law.

The research on women's responses to harassment shows a clear pattern; the majority of women who are harassed chose not to file a formal complaint. The most often cited reasons for this reluctance are: they fear retaliation in the workplace, they believe

their complaint will not be taken seriously, and they are concerned that even if they complain, nothing will be done to address the problem. My examination of the experiences of these women who did complain helps to elucidate the power structures that reinforce patriarchy in the workplace and exposes the numerous ways that women are discouraged from filing complaints or pursuing legal remedies.

Since the 1991 confirmation hearings for Justice Clarence Thomas and the public airing and of Professor Anita Hill's claims of harassment, sexual harassment case filings have dramatically increased. In response the majority of corporations, universities and public sector employers have established anti-sexual harassment policies and procedures for filing complaints. The 1998 Supreme Court decisions in *Faragher v City of Boca Raton* and *Burlington Industries v Ellerth* established an affirmative defense for companies who could show that an employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer" (Ellerth at 745). These decisions, in effect, provide a defense for employers to simply show they have a policy in place, regardless of the effectiveness of the policy (Hernandez 2006).

My interviews with women who have filed sexual harassment complaints supports the contention that *Ellerth* and *Faragher* have had the unfortunate impact of moving the law further from the reality of women's lives, and have created an additional obstacle in the path of women who seek to challenge sexual harassment in the workplace. These interviews with women who have experienced harassment and chosen to file a complaint offer insight into how social forces in the workplace inform women's perception of harassment, and how those already disempowered by the system are further marginalized by the institutional power structures and legal procedures as managers,

supervisors and EEO officers ignore, disregard or minimize the complaints brought to them. My respondents turn to the law with the understanding that what they experienced was clearly a legal wrong, and they are faced with a combination of inherent sexism of legal doctrine and process, the inability of law to change social attitudes, and an existing power structure which places them in a disadvantageous position.

The descriptions of the harassment and abuse these women have suffered makes it clear that sexual harassment in these workplace environments is prevalent and often condoned or ignored. They describe a culture which refuses to acknowledge the harms done to them as women and as workers, which refuses to punish the perpetrators, and diminishes and devalues them by paying lip service to equality. They evince an awareness of patriarchy and its ubiquity in our legal and political institutions (although they would never term it as such), and understand that their unequal treatment is the result of fundamental attitudes about gender and sex roles that are at the crux of our legal, political, and social institutions.

The respondents describe, without exception, hostile environments in which women were routinely degraded and abused in large and small ways, through hiring practices, management decisions, rude jokes and sexualized behavior. They describe a system of institutionalized sexism in the workplace and find that when they try to go through the “proper channels” to report the harassment, the institutions and policies put in place to assist the victims of harassment often work to defend the harassers and protect the status quo. They have come to understand that the established power structure defends and supports the continued abuse of women. R refers to the sexism apparent in the workplace, and the assumptions that define women as sexual object, “I think it was a

given that that was a way for women to come up and rise and improve their career, if they allowed themselves to be touched or fondled or whatever came their way...It is a very male dominated environment and it is a way to get over.”

These women articulate their understanding of a patriarchal power structure and awareness of the way gender stratification in the workplace serves to disempower women. S says, “It could never be on the other foot in my opinion. I don’t ever think there could be a bunch of men taken advantage of at work the way women are...They have no one to answer to. They have so many people rallying behind them to conspire together to come up with an excuse that is going to just cover it all up and make it okay, when it is wrong... It is tolerated.” R talks about the impact of hearing the stories of other women, and how it animates her sense of outrage and injustice:

I think Women’s Rights at Work, they were really an integral part of my healing...I really got upset at seeing so many different women being victimized, different age groups and different colors and different sizes. So I didn’t feel so alone ...When I saw all these other women telling the same story and feeling the same way and going through the same hurdles I went through, I was outraged.

JB describes the power that men have and assert over women’s economic well-being and how they exploit women’s powerlessness, “It is a man’s world, they control you...Oh, you are going to lose your job if you file a complaint. That is definite, they know that. They know you have kids to feed, that is why they look for single women.” She expresses not only her cynicism about the workplace, but a deep disillusionment with the broader political system. She asserts that the continued sexual abuse of women by men in positions of power and authority is part of an institutional system. “But what can you do? I think from the Governor on down, Bill Clinton, sexual harassment is from his house to the White House to my house. It has been going on and it is not going to stop. I

don't think there is anyone in the United States that is going to stop it."

In addition to sexual abuse and harassment, a number of the respondents referred to overt sexist hiring and promotion practices in their workplace. W reports, "They don't hire women into management positions...There are not women in the Administration office. They don't post jobs...and the things they say about women - it's not right." JJ acknowledges, "They promoted the males. People come in, I trained them, and then they promoted them over me." V refers to the perceptions of women in a male dominated profession, "There is always going to be the issue that we are not capable and what are we doing here, and that is still there...because I am a woman, there is the very general idea that you can't quite handle the work."

Despite this awareness of the patriarchal power structure, these women express a strong desire to believe that the law is nevertheless a resource to protect and defend the weak and downtrodden. It is clear that the women in this study turn to law as a last resort, they turn to the law with a belief that law matters, appealing to an entity more powerful than the employer. These findings are consistent with Merry (1990), who describes finding a broad sense of entitlements and rights which often revolve around the belief in the power of the state to defend the powerless. She asserts that women are more likely to turn to the law in situations in which they are relatively powerless:

[the law] represents for them a resource in relationships of unequal power... Women's use of the courts is another aspect of the general pattern of relatively vulnerable and powerless people turning to the courts for help in those relationships in which they feel at a disadvantage. [They view the law as a] source of authority in a society organized by rules, not by violence, and dedicated to mythic ideals of equality, even if these are rarely achieved in practice (p. 178-179).

Merry found among her respondents a view similar to the ideology which I have

termed “myth of law,” which reflects the belief that the law should protect and empower those without access to other forms of power. Yet, people are cautious in their approach to the law. Like my respondents, the citizens in Merry’s study were not anxious to engage the law, but rather viewed it as...“a last resort, a desperate move when all else seems to have failed... People hesitate to turn to the court unless they feel that important principles are at stake” (p 172). For my respondents, appeal to the law is seen as an attempt to exact justice, an appeal for recognition of the wrong done to them, even though they recognize that the law cannot give them back their dignity or undo the abuse and demeaning experiences they have been through. My interviews reflect a search for validation among the respondents and a recognition of the wrong they have suffered, yet they realize their appeal to law is problematic.

This study does not address the question of why certain women choose to appeal to the law in response to harassment, while the majority do not. Some scholars have shown that the actions of employers and their agents, as well as institutionalized workplace and social norms can serve to discourage workers from framing their experience as harassment or discrimination (see Albiston 2005, Edelman et al 1993). Marshall (2003) suggests that whether women identify certain behavior as harassment is informed by the frame of reference they bring to the situation. She found that, “While legal frames do provide crucial guidance to women evaluating the behavior of their colleagues and supervisors, working women deployed a number of other interpretive frames when deciding whether they had been harmed by such behavior”(p. 659).

This study does not examine the question of how different frames may influence

behavior and perceptions of harassment and the law; the women in this study were chosen because they had already defined their experience as harassment and framed it as a legal issue. My findings suggest that for those women who do frame their experience of sexual harassment in a legal context, the experience of harassment and the effort to engage the law to hold the employer accountable can serve to emphasize the structures of patriarchy. The women in this study seek to engage the power of law on their own behalf and they see the legal system as providing an opportunity to challenge the existing power structure. Even though they recognize that the legal system is part of the very power structure they seek to challenge, and many acknowledge that the law against sexual harassment is an assault on deeply entrenched social attitudes, their stories illustrate how law can create opportunities for resistance.

Legal Mobilization as Resistance

Among my respondents legal mobilization can be understood as an act of resistance. The stories told by these women about their experience filing a sexual harassment complaint suggests that a significant source of law's appeal lies in the persistence of a "myth of law" ideology. For these women the appeal to law reflects a search for acknowledgment of the wrong they have suffered. They express a belief in the potential power of the law to empower those who seek to use it. Despite the frustration, retaliation, personal and financial difficulties they experience, and the recognition that they are unlikely receive a large settlement or see the offender punished, most of the women I interviewed expressed a sense of personal vindication from the act of filing a complaint. These women understand the law against sexual harassment as providing a

legitimate way of articulating the harm done to them. All of the women I interviewed were motivated by the symbolic power of the law, and sought to use the law as an act of resistance. P expressed it most plainly when she said, “I didn't want to go out with my tail between my legs.”

My findings are consistent with those of Ewick and Silbey (1998), who found among their respondents that appealing to the law is a way of asserting oneself:

Consciously positioning oneself in relation to the law provides a culturally interpretable way of expressing something about oneself or one's relationship to others...assuming the costs of a legal contest, even in the face of likely defeat, might be used to show that you are not to be pushed around...People turn to legality to assert values, rights (their own or others), or even some conception of justice. [In this context] legality functions as both a means and an ends...It sometimes provides tools for achieving some purpose and at other times it becomes a purpose in itself (p. 133-134).

Each of the women that I interviewed felt that she had taken her complaint as far as she could, whether that was an internal grievance, filing with a state or federal agency, or filing a lawsuit. The first step in the process was filing an internal complaint, either through internal EEO agencies or to a manager or supervisor. In the case of four of the twelve women, this was as far as they were able to go. Four of the respondents had proceeded as far as a lawsuit at the time of the interviews. B and P had the financial resources to hire a lawyer to represent them. R was able to find a lawyer who agreed to represent her on a contingency basis after an investigation by the EEOC resulted in a “right to sue” letter. V, who made a good living as a carpenter and continued working, filed her case pro se - without a lawyer. The remaining four found themselves in legal limbo waiting for the EEOC or a state agency to follow up on their case.

For the women who were denied access to the legal system by internal gatekeepers who dismissed their complaints with a cursory investigation, this experience

seems to have fostered a sense of disillusionment. They express frustration with the contradiction between the myth of law and their own experience. JJ describes the response when she filed a complaint of harassment with the internal EEO office at her workplace, “Their response was that they just told me they didn’t have any finding. Everything that was said, all the information that I gave them, witnesses that were present, they always tell me there was no finding. That was the only response, it didn’t happen.”

D expressed a sense of resignation, of having challenged the system and lost. She describes her experience with an institution against which she feels so powerless as to be virtually invisible:

Many classes as a matter of fact are taught by the man who harassed me...In front of the president of the college and every other public official, he just harassed me.... when I went for help from sexual harassment committee (after a year of this, and it went on for two years afterwards) they somehow never got back to me...that guy is so guilty, and I don’t even deserve someone telling him apologize to this woman, a, or b, any kind of action taken. Do you understand what I am saying? Like, I am thoroughly invisible.

Ultimately, she conveys a feeling of hopelessness, “But there is no way for me. I have to let go of it. I can’t bring it any further.”

S, having filed a complaint with the police department, suffered ongoing retaliation which culminated in her firing. Her complaints to the union and that state agency were ineffectual and left her feeling lost in the system:

I had a terrible car accident... I was home for about two weeks, they came home to my door and gave me a termination letter without reason. From there the union was supposed to challenge the termination and put in a request to have me reinstated. That never happened. To this day I rarely hear from the union...I feel I’ve been abused and I’ve been a victim, and I still am being victimized. I went and filed a claim with the state, I am just a number there. I don’t hear from that case worker. And any follow up information I sent to her just gets collected in my file.

JB's experiences of continued harassment with no apparent accountability left her cynical about the entire political system. She expresses the belief that all public institutions share complicity with the legal system in their false promise of justice and equality. She contends that the power structure supporting and encouraging harassment extends beyond her specific department, to the city authorities as well:

I find many of the politicians used to work there. My assemblyman, he was a part of that old boy network. He was a part of it, he's been there, he's done that. So he is not going to complain, because he may lose the election and he may wind up back there. My congressman worked there. He knows what went on there, he is not going to touch it, nobody is going to touch it. Those men get free sex. Nobody is going to stop it, it is just something you just go along with. How many women get in there and complain? They complain once. And they are history after that.

Even the women who were unsuccessful in their efforts, those who felt frustrated and defeated by their appeal to the law, expressed the significance of their action, not in terms of outcomes or financial gain, but in terms of asserting themselves. In response to the question, "What do you hope to get out of this?" S replied, "Really and truthfully, some part of my dignity again. I think it is disgusting that they can do all of these things to me and just not ever have it addressed. I want it to be addressed." These women maintain a belief in the symbolic power of law and filing a complaint as an act of resistance against the status quo. A discusses her sense of resignation about the inability to hire a lawyer to move her case forward, but nevertheless, she continues to hope that eventually the law will come to her aid, "I have nothing to lose. I really have nothing left to lose. I would like to see it settled one way or another. But like I said, I didn't do anything. I am not the guilty party here, I am the victim...So I just have to sit here and wait it out, how ever long it takes."

All of the interviews reflect the sense of appealing to the law as an act of

resistance, but the language of resistance is different for different women. For many of these women, the language of resistance was primarily about survival, their own survival and that of the families dependant on them. Their decisions to quit work, to remain at the job, to pursue a legal claim or to let it go, are driven less by abstract ideals than the necessities of life. S talks about her decision to file a complaint with the EEOC after her efforts within the police department resulted in her firing, “And it was a horrible situation for my family. My daughter had to go through that, my fiancé had to go through that. I did have to take a vacation, literally take a vacation to de-stress. After I finished being very angry and fearful and stressed, very angry, then I decided to pull myself together and come back [home] and fight. That was the only thing I could do.” A reports that her primary her concern was the impact on her daughter, after quitting her job she had to spend the savings which was intended for her daughter’s college fund:

Really I just wanted my six months that I lost, and I’ll tell you why. I had an account for my daughter, saved for her college. Well, when I wasn’t getting any income for six months, I had to attack that for my bills. Now I am saying to myself I have to replace this. It is like my daughter paying for it, even though it was my money; but I gave it to her. It was like a college fund type of account. And that really made me more mad than what I went through with him, because now it is affecting my daughter.

JJ, whose complaint to the internal EEO officer was never followed up or investigated, talks about her need to remain at the job long enough to get retirement benefits, despite the ongoing harassment. “But I am tired. I am tired working like that. I need to quit, but I cannot quit my job. I have an eleven year old son. I’ve been there for over 30 years. I am trying to work for a few more years, about four more years or so, then they can have their job. I think they are trying to force me out before retirement... Another couple of years and I’ll be retired, if I am able to hold on to my job that long.”

For C, who had previous experience with the legal system when she was raped years before, the decision to file a complaint was taken out of her hands. The harassment was reported by her supervisor and the internal EEO office was obliged to follow up on the complaint unless she denied that any harassment occurred. When C finally went to the EEOC she was primarily concerned for the safety of her family and the economic strain of paying for continued therapy and medication. “The EEOC said, what do you want? I said, I want a letter and in fact, I was so shook up, I said I want a letter of prior restraint for me, my father, and my family. I want him to be put somewhere on a highway detail where he won’t be near women. And I would like them to, well, I didn’t ask for any money, but I said I would like compensation for my psychiatrist and medicine. That’s what I asked for.”

All of the respondents recognize that they took the hard road; for each one who complained, there are still many more women who have left jobs, been demoted or continue to be abused and harassed in the workplace. The women I interviewed do not necessarily expect that the law will solve the problem, although that is certainly part of what motivates them. Their actions are intended to create awareness of the problem and force a change in workplace behavior. Each of them emphasized the importance of standing up to their harassers and speaking out against the problem of harassment. Many spoke about the desire for some type of revenge or recompense, and wanted acknowledgment that they had been wronged. B states, “I was like you know what, I am not going to take this shit any more, I am not going to accept it. I was like these people are not going to do this to me... I deserve something. These people are not going to treat me this way, they are going to have to pay.”

Although her first thoughts were of resistance and revenge, B talks about how her perspective and goals changed as she went through the legal process. She describes her change in attitude as her initial concerns expanded into an awareness of the suffering of other women at the hands of the offender and the realization that she is in a unique position to make a difference:

Initially, I felt such hatred towards them for putting me through that. I was like purely revenge. I was like who are these people to get away with this. I am the only one to complain...And then even further into it, I was like hopefully I am doing something that none of these other women had the strength to do. They didn't speak up for themselves, they didn't quit. I am the only one. So maybe it will put a stop to him doing this again. Which is awful, that is the last thing I realized; but I realized it and it is good. At first you are thinking just about you, but then you know what, I might help other people.

Most of my respondents echoed this awareness that the majority of women are afraid to challenge harassing behavior. As a result of their own experiences, my respondents understand the reasons behind the fear that keeps women from coming forward to complain about sexual harassment in the workplace. The women who were able to engage the legal system and move their cases forward express a profound desire to do something for those women who are afraid to come forward, and those that will come after them. According to R:

I feel that it would send a message, even in a small way, to them. First of all, letting them know that this is wrong, this is illegal, and this does have consequences...In that small way, if it helps one or two other women that have to come behind me and sit in that seat at that job, it is worth it. Because if the women had done it before me, I would have not gone through it. Now that I have brought it out in the open, I don't think he will be as free to touch another woman's breasts without her consent as he was before.

These women were willing to challenge the power structure by appealing to the symbolic power of the law in an effort to make a difference. Many of them also spoke

about the desire to achieve change on a broader scale, for greater recognition of the problem of sexual harassment and the hope that their actions might help other women in similar situations. P had the financial resources to hire an attorney to file a complaint after she quit her job in response to the harassment. She ultimately agreed to a settlement, even though she says, "To have a legal determination against [the employer] would have been much more satisfying. With a settlement it is all private and confidential, there is no public record." She found the legal process so excruciating and the investigation into her family's private life, so disruptive, that she decided that settling would be easier on herself and her family. However, she says part of her did not want to settle, but wanted to go to court to make her point. She told her lawyer, "I want them to remember me."

Only a few of the women I interviewed spoke of resistance in the broad language of rights and justice. W, a professional woman in her 50's describes herself as a feminist and asserts that she has always been an activist. "I have always been a feminist, and an activist as far as that goes... So I have always been a defender of women's rights and started when I was in school also. I was president of a non-profit neighborhood organization, Anti-Poverty Group for Women...So that is the kind of thing I have been involved with for a long time." She recognized the sexism and racism in her workplace and felt that she had to speak out not only against the sexual harassment, but also on behalf of two men of color who were being discriminated against, "I can't stand injustice, so when I see things like he blamed the guy from India for something he had nothing to do with, and he blamed the guy from Africa for something he had nothing to do with. It went on and on."

V also spoke about her experience and her motivation in terms of rights and

justice. After failing to obtain a lawyer to represent her, V decided to file *pro se* because, despite the difficulties, she insists upon the importance of standing up against discrimination and abuse. V's comments reflect the powerful desire to create social change. She talks about her position as a black woman who has benefitted from the struggles of those who came before her, and recognizes a responsibility to those who will come after her:

But also there have been women who've come before me who had a more stressful and a more egregious time in the business in general than I have now. But because of them, here I am, and I want to make it better for the next person. If I can help in that particular issue, I should hope I make it better as far as proving that women can do the work, are talented and capable and able to do the work....That is one reason I felt I had to come forward. I am a black woman also, so there is the discrimination there still too... I walk in somebody else's shoes. I am here on the back of somebody else in all respects in life, as a woman, a woman carpenter, as a black woman. So it is my responsibility when I see a wrong to try to correct it, especially when somebody is touching me, that is egregious enough that I shouldn't let it go... So basically it is kind of my duty to stand up for myself and other women who are coming after me.

R also articulates a language of resistance that emphasizes the importance of a support network among women and those disempowered and marginalized by powerful institutions:

And I can tell women who if they confide in me... I will be able, I think, if any woman or any man comes to me and tells me that this is happening to them, I think I can advise them...Because as small as we think the world is, it is really a big place. It does get smaller when each of us connect...yeah, this woman did do it and maybe I can do it too. It may seem to them like it is not something that is insurmountable, that they can be lone voice crying out; whether it is from within a huge monstrous organization...or without it. It doesn't matter. But they will be heard.

For my respondents, the act of articulating a grievance and/or filing a complaint was, in and of itself, regardless of the outcome, and act of resistance against the

patriarchal power structure. They recognize their limited power in the workplace and come to understand that the institutions of the legal system are designed to protect the status quo. Nevertheless, they assert their own experience as a way to challenge the status quo. An ideology that I have termed the “myth of law” encourages them to file a complaint, but the evolution of legal consciousness is ongoing. As these women adapt and respond to the legal process and the obstacles placed in their path, some drop their complaint, feeling the system has beaten them, but others persevere in the effort to regain some sense of control over their own life and the knowledge that they did all they could to challenge the powers that have abused and oppressed them. In response to a question about her goals in filing the complaint, R says simply, “I am hoping, number one, to be able to be marked not as a victim, but as a victor, as a survivor. Number two, I think that for myself there will be some sort of closure, in a matter of speaking; because I have done everything I could do my own way to heal myself.” These women appealed to the law as an act of defiance - a way to fight back and show that are not simply victims.

Questions for Further Research

This project has provided insight into how legal ideals inform attitudes and behavior, and how life experience and interaction with the law can influence legal consciousness. My research suggests that women turn to the law against sexual harassment because they believe in the symbolic power of the law. However, their interaction with the legal system and legal actors often reinforces their own sense of powerlessness and the ways that social, economic and legal institutions enforce the status quo and stifle the voices of those who would

challenge the power structure.

Like racism, sexism is a result of long established norms and behaviors. The challenge of those who would turn to law to affect social change is significant. Legal institutions, like social attitudes are slow to change. The evolution of sexual harassment law and imposition of sexual harassment policies has made sexual harassment “politically incorrect” but the practice remains ubiquitous. Nevertheless, the impact of law on individual conceptions of rights and wrongs is significant. Despite the many obstacles they encounter, these women have chosen to come forward to mobilize the law against sexual harassment and challenge the status quo. Their actions, and the legal consciousness that motivates them, create opportunities for ongoing social change as individuals mobilize the law in an effort to shift the existing power structure.

I chose a very diverse group of respondents, in order to glimpse the ways that different life experience and social context informs legal interaction and legal consciousness. Although the small scale of this study means that I cannot draw generalizations, nonetheless, it allows for a closer look in the attempt to explain of the role of power and gender in American Law. The commonality among all the women that I interviewed, white, black, latina, working class or middle class, was the consciousness of the institutional social, legal and economic structures that oppress women. The women in this study are aware of patriarchy as the anti-female bias which is institutionalized in our law, and social practices.

There are a number of questions that this study illuminates, but cannot answer, and which indicate a need for further research. The importance of economic status in the

American legal system is clearly implicated in this study. Those with the economic resources are able to bypass many of the gatekeepers. Since most sexual harassment cases are taken on a contingency basis, it is often the income of the respondent, and the “deep pockets” of the employer which figure prominently in the attorneys decision about whether to take a particular case. However, the strong correlation between race and socio-economic status in American society makes it difficult to disentangle the two.

It appears that the diversity among the black women in my study had the effect of obscuring rather than illuminating the significance of race in their legal consciousness. Five of my respondents were black, among them R, the carpenter, has the highest income of all the women in my study, and was the only one to explicitly speak of her experience as a black woman. Because the interviews were designed to be respondent driven, and structured in a way to minimize the imposition of concepts and categories from the interviewer, I did not directly ask questions about race (I asked only about the demographics of the workplace). I expected that the respondents would bring up the issue as it was salient to their experience. In fact, both S and JB, who worked largely black populations, volunteered that they were harassed by both black and white men. Both JJ and JB, who were over 50 seemed to express resignation to the idea that as black women, they were on the bottom of the power structure, below all men and white women. More studies that focus on the intersection of race and gender are needed. Further research should attempt to better understand the dynamics at the intersection of race, class and gender and how these interrelated identities inform legal consciousness and legal behavior.

My findings are consistent with those of others who indicate that many factors

influence the decisions that women make with regard to pursuing a legal claim (Marshall, 2003). Women's responsibilities as a parent and caregiver are often critical in informing their decision whether or not to file a legal complaint (Morgan, 1999). Workplace context and perceptions of rights and justice play an important role in legal consciousness and legal behavior (Albiston, 2005). Understanding how these different roles inform legal consciousness and decision making is critical to bridging the gap between law and women's lives.

The EEOC data shows a decline in sexual harassment case filings beginning in 2002, from 14,396 to 12,025 in 2006. The Supreme Court decisions in *Faragher* and *Ellerth*, which essentially require victims of sexual harassment to utilize anti-harassment policies instituted by the employer, and my own findings regarding the hazards of these internal reporting procedures, strongly suggest that these cases have had the effect of depressing the number of sexual harassment complaints that are filed. A closer look at the effectiveness and impact of employer instituted anti-harassment policies is warranted.

Finally, further exploration into the role of feminist consciousness or feminist ideology into legal consciousness is called for. My study confirms the existence what might be understood as a feminist consciousness in terms awareness of the devaluation and oppression of women. But whether that consciousness is a product of their experience of harassment or a pre-existing attitude, my research cannot determine. Do women frame their experience of harassment in a certain way because of pre-established feminist attitudes? Or is there a reciprocal relationship between sex discrimination and feminist consciousness? The role of support organizations in women's perceptions of, and decision to mobilize the law is a related question. Some of the women in this study

indicated strong feelings about their connection to other women as a result of participating in information sessions at Women's Rights at Work. Again, however, the small scale of this project prevents generalizations about the role of such organizations. Clearly, they provide information about the law and the legal process, which may not be easily obtainable by other means. But what role such organizations play in mobilizing women or developing feminist consciousness is worthy of further study.

APPENDIX I:

Sexual Harassment Survey

Your input is extremely valuable, the information that you provide is essential to the success of this important research project. Please answer all the questions on both sides of this sheet and return it in the enclosed postage paid envelope. Thank you for your cooperation.

S. Sasha Patterson

- 1) When did you first feel that you were being sexually harassed?
Month_____ Year_____
- 2) Who were you being harassed by?
Supervisor_____ Co-worker_____ Other_____
- 3) Did you mention the harassment to a supervisor at the time? Yes____ No____
- 4) Did your employer at the time have established procedures for filing a sexual harassment complaint? Yes____ No____ Don't know____
- 5) Did you file a formal sexual harassment complaint or grievance with your employer at the time? Yes____ No____
- 6) When did you first file a claim of sexual harassment with a lawyer or an organization such as the EEOC, or New Jersey Division of Civil Rights?
Month_____ Year_____
- 7) What is the present status of your complaint? (check all that apply)
Investigation in progress____ Awaiting trial ____ Settlement negotiations in progress____
Settled____ Dismissed____ Court decision____ Other_____
- 8) If your case has concluded, when was the final settlement or court decision reached?
Month_____ Year_____
- 9) Did you leave your job as a direct or indirect result of the sexual harassment?
Yes____ No____
- 9a) If yes, what was your previous occupation? _____
- 10) How interested are you are in national politics and national affairs?
Very interested____ Somewhat interested____
Slightly interested____ Not at all interested____

- 11) How interested are you in local community politics and local community affairs?
 Very interested___ Somewhat interested___
 Slightly interested___ Not at all interested___
- 12) If you had some complaint about a local government activity and took that complaint to a member of the local government council, how much attention do you think he or she would pay to your complaint?
 A lot___ Some___ Very little___ None___
- 13) If you had some complaint about a national government activity and took that complaint to a representative of the federal government, how much attention do you think he or she would pay to your complaint?
 A lot___ Some___ Very little___ None___
- 14) How much influence do you think someone like you can have over local government decisions?
 A lot___ Some___ Very little___ None___
- 15) How much influence do you think someone like you can have over national government decisions?
 A lot___ Some___ Very little___ None___
- 16) How often do you vote?
 Every election___ Most of them___ Some of them___
 Once in a while___ Not registered to vote___ Not eligible to vote___
- 17) What is your age?
 18-24___ 25-34___ 35-44___ 45-54___ 55-64___ 65 or over___
- 18) What race do you consider yourself? (check all that apply)
 White___ Asian___ Hispanic/Latina___ Black/African American___
 Multi-racial___ Other(specify)_____
- 19) What is your current marital status?
 Never married___ Married___ Separated/Divorced___ Other_____
- 20) Do you have any children? Yes___ No___
- 20a) If yes, how many children in each age group are living with you?
 0-5___ 6-12___ 13-18___ over 18___
- 21) What is the highest level of education you have completed?
 Some high school___ High school diploma (or GED)___ Some college___
 College degree___ Graduate or professional degree___
- 22) Are you presently employed? Yes___ No___

22a) If yes, are you employed full or part time? Full time____ Part time____

23) What is your present occupation? _____

24) How long have you been employed in this job?_____

25) Approximately how much do you personally make in a year?

under \$15,000____ \$15,000-\$24,999____ \$25,000-\$34,999____

\$35,000-\$49,999____ \$50,000-\$74,999____ \$75,000-\$125,000____

over \$125,000____

26) Including everyone in your household, what is the total amount earned in a year?

under \$15,000____ \$15,000-\$24,999____ \$25,000-\$34,999____

\$35,000-\$49,999____ \$50,000-\$74,999____ \$75,000-\$125,000____

over \$125,000____

Thanks again for your help with this project. May I have your permission to call and ask a few follow up questions? If so, please indicate your name, phone number, and the best time to call below. You can be assured that your participation will be kept strictly confidential.

Name (please print)_____

Phone number (include area code)_____

best time to call_____

APPENDIX II:

Interview Script

Revised September 2000

Intro-

First, I want to thank you for taking the time to speak with me. I am interviewing women who have filed SH complaints and asking them to tell me about the experience. Although there is quite a bit of information available about sexual harassment, there is very little information about the women who are the victims of harassment. I am interested in hearing about your experience.

Before we start, I would like to ask for your permission to tape the conversation - I do this to make sure that I have an accurate account of your words. (Note date and time of interview)

1. I would like to start by asking you briefly describe the harassment which eventually led to your filing a complaint. (If not included in response, probe for following information:)

What was your relationship to the harasser?

How long did you work there before the harassment began?

What was your initial response to the harassment?

(did they begin with common, "non-assertive" responses, try to solve problem on their own?)

How long did this go on before you filed a complaint?

2. Did you immediately identify this behavior as sexual harassment?

If not, what led you to identify the behavior as harassment?

3. Do you know if other women also experienced harassment?

Was the harassment targeted at you specifically or was there generally anti-female comments?

Did anyone else complain about the harassment/behavior?

4. Were others in the workplace aware of the harassment?

Did you talk to your co-workers about the situation?

5. Did you talk to anyone about the situation; friends, family, spouse?

6. What was the workplace environment? Was it mostly men, women or mixed?

(was it a hostile work environment?)

7. What was your position? (*full time or part time?*)

8. Were there both men and women in supervisory positions?

9. What happened between the time the harassment started and your decision to file a formal complaint? *Was there a particular event that made you decide to file a complaint?*

How long did the harassment continue before you filed a complaint?

10. Where did you get information about the law and your legal options in this situation?
(*Did you seek legal advice from lawyers or friends, associates?*)

11. Where did you go to file your initial complaint?
(internal EEO office, city agency, state or federal EEOC office, or lawyer)

12. What was the response?
Did they provide you with useful information?
Did they conduct an investigation?

13. How would you describe process itself?

14. What is the status of the case now?

15. What were your expectations when you decided to file?
What did you expect would be the result from your filing a complaint?

16. How did the actual experience differ from your expectations?

17. (Of those whose cases were concluded) How do you feel about the outcome of your complaint?

18. Looking back over the whole experience, the harassment, the process of filing a complaint
(and the eventual resolution *if applicable*) what would you say you learned from this experience?

Final notes

Confirm demographic information from survey: Age, race, marital status, children, education, current employment status.

Thank you very much for taking the time to talk to me.
If I could have your address, I will send you my card in case you want to get in touch with me. I would very much like to hear if there is any change in the case.

Do you have any questions that you would like to ask me?

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